TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 126

INGRAM-DAY LUMBER COMPANY, PETITIONER,

vs.

SYDNEY C. McLOUTH, REVIVED AGAINST THE AMERICAN LOAN & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1927

CERTIORARI GRANTED NOVEMBER 14, 1927

(22,999)

(32,209)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 642

INGRAM-DAY LUMBER COMPANY, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1926

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IN THE

District Court of the United States

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

DECLARATION

(Filed Aug. 2, 1920).

Eastern District of Michigan, Southern Division, ss.

Ingram-Day Lumber Company, which at all the times hereinafter mentioned, was and still is a corporation organized and existing under the laws of the State of Wisconsin and of no other state, having its office and principal place of business in the City of Eau Claire, Eau Claire County, State of Wisconsin, and was and still is a citizen of the State of Wisconsin and a resident of the City of Eau Claire, Eau Claire County, State of Wisconsin, and a resident of the Western District of Wisconsin, by Miller, Canfield, Paddock and Perry, its attorneys, complains of Sydney C. McLouth, who at all the times hereinafter mentioned, was and still is a citizen of the State of Michigan and a resident of the City of Marine City, in the County of St. Clair and State of Michigan, and a resident of the Eastern District of Michigan, of a plea of trespass on the case upon promises, filing this declaration as commencement of suit.

I.

For that whereas heretofore, on or about, to-wit, February 5, 1919, the plaintiff and the defendant made and entered into a certain contract, a true copy of which, marked Exhibit "A," is hereto attached and expressly made a part hereof in all respects as if herein inserted, reference to which contract is hereby expressly made.

For that whereas heretofore on or about, to-wit, February 5, 1919, the plaintiff and the defendant made

and entered into a certain supplemental understanding in connection with said contract Exhibit "A," a true copy of which supplemental understanding, marked Exhibit "B," is hereto attached and expressly made a part hereof in all respects as if here inserted, reference to which supplemental understanding, Exhibit "B," is hereby made.

For that whereas heretofore on or about, to-wit, March 7, 1919, the plaintiff and the defendant made and entered into a certain amendment of said contract Exhibit "A," said amendment being evidenced by written communications between the plaintiff and the defendant, marked respectively Exhibit "C," Exhibit "D" and Exhibit "E," which exhibits are hereto attached and expressly made a part hereof in all respects as if here inserted, reference to which Exhibits "C," "D" and "E" is hereby expressly made.

For that whereas heretofore, to-wit, on February 5, 1919, at, to-wit, Marine City, Michigan, in consideration that the said defendant at the request of the said plaintiff had, as aforesaid, bargained for and agreed to buy of the said plaintiff certain goods and chattels as aforesaid, to-wit, 1,537,032 feet of specially cut and manufactured lumber, all as more specifically described in said Exhibits "A," "B," "C," "D" and "E" aforesaid, to be delivered by said plaintiff as soon as cut and manufactured, and entirely within, to-wit, from four to six months, to the said defendant free on board the cars at, to-wit, the various mills of the plaintiff for the agreed price of $65.35 per thousand feet, board measure, (except as such price was amended in part by the provisions of said Exhibits "A," "B," "C," "D" and "E") to be then and there paid by the said defendant to the said plaintiff, the said plaintiff then and there at, to-wit, the time and place aforesaid promised the said defendant to sell to him goods and chattels as aforesaid and to deliver the same to the said defendant free on board the cars at the various mills of the said plaintiff, at the above prices all as aforesaid, as soon as cut and manufactured, and within on or about, to-wit, from four to six months after, to-wit, February 5, 1919.

And the said plaintiff avers that afterwards and on, to-wit, the 11th day of August, A. D. 1919, it was ready and willing, and then and there tendered and offered to deliver to the said defendant, the balance of lumber then due to the said defendant under said contract Exhibit "A" as mentioned as aforesaid, at the places and at the prices mentioned in said contract, amounting in all to, to-wit, 919,696 feet, board measure, of lumber, and then and there requested the said defendant to accept the same and to pay the said plaintiff for the same as aforesaid; yet the said defendant, not regarding his said promises, did not nor would when he was so requested, or at any time before or afterwards, although often requested so to do, accept the said balance of 919,696 feet board measure, of lumber as aforesaid, or any part thereof, nor pay the said plaintiff for the same, but wholly neglected and refused, and still neglects and refuses so to do. To the plaintiff's damage $100,000.00 and therefore it brings suit.

II.

And plaintiff for a further cause of action against the defendant avers the following:

For that whereas the said defendant heretofore, to-wit, on the 2nd day of February, A. D. 1920, at, to-wit, the city of Lyman, in said County of Harrison and State of Mississippi, was indebted to the plaintiff in the sum of, to-wit, $64,314.96, for the price and value of goods then and there sold and delivered by the plaintiff to the defendant at his request.

And in a like sum for the price and value of work then and there done and materials for the same furnished by the plaintiff for the defendant at his request.

And in a like sum for money then and there lent by the plaintiff to the defendant at his request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at his request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found

to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant afterwards, and on to-wit the day and year aforesaid, in consideration of the premises respectively, then and there promised to pay to the plaintiff the said several sums of money respectively on request; yet the said defendant (although often requested so to do), has disregarded his said promises and has not paid any of the sums of money or any part thereof.

To the plaintiff's damage of $100,000.00 and therefore it brings suit.

Miller, Canfield, Paddock & Perry,
Attorneys for the Plaintiff.
Business Address:
2148 Penobscot Building,
Detroit, Michigan.

White & Ford,
Of Counsel for the Plaintiff,
Business Address:
Gulfport, Mississippi.

EXHIBIT "A"

"INGRAM-DAY LUMBER COMPANY

Lyman, Miss., 2/5/1919.

Sydney C. McLouth, Esq.,
Marine City, Michigan.

Dear Sir:

In accord with verbal understanding this day had with your Mr. Jno. J. Manley, we are entering your order as follows. From your schedule dated 12/13/18 headed "Balance of Flitches required to complete four tugs."

Dense Merchantable Yellow Pine

Rough, Bark Edge Flitch 192 pcs. 9x27 or wider 8'
" " " " 9x30 or wider 300' lin.
" " " " 9x26 or wider 1280' "
" " " " 9x24 or wider 868' "
" " " " 9x22 or wider 2153' "
" " " " 9x20 or wider 1977' "
" " " " 9x18 or wider 4032' "
These items to be in long lengths, the number of lineal feet of each width the Flitch contains to be counted separately. No face to be less than 18".
" " " " 16 pcs 10x30 or wider 8'
" " " " 16 pcs 10x30 or wider 9'
" " " " 16 pcs 10x30 or wider 10'
" " " " 48 pcs 10x18 or wider 4'
" " " " 48 pcs 10x18 or wider 6'
" " " " 48 pcs 10x18 or wider 8'
" " " " 48 pcs 10x16 or wider 8'

The above being in all approximately 227,000'.

And from your schedule dated 1/9/19 headed contract No. 457 W. C. Timber order for Tugs, etc.

Dense Merchantable Yellow Pine

15 Pcs. 14x14 46' 8"8 to 13¾x13¾
5 " " 16' " "
5 " " 38' " "

10	"	"	46'	"
5	"	"	16'	"
10	"	12x14	28'	"
10	"	"	46'	"
5	"	"	14'	"
20	"	"	46'	"
5	"	"	38'	"
5	"	"	28'	"
5	"	14x16	20'	"
5	"	14x14	14'	"
5	"	12x12	14'	"
5	"	"	16'	"
10	"	10x10	18'	"
5	"	14x14	14'	"
5	"	"	22'	"
5	"	10x14	10'	"
10	"	10x12	44'	"

$11\frac{3}{4}$x$13\frac{3}{4}$
"
"
"
"
"
"
$13\frac{3}{4}$x$15\frac{3}{4}$
$13\frac{3}{4}$x$13\frac{3}{4}$
$11\frac{3}{4}$x$11\frac{3}{4}$
"
$9\frac{3}{4}$x $9\frac{3}{4}$
$13\frac{3}{4}$x$13\frac{3}{4}$
"
$9\frac{3}{4}$x$13\frac{3}{4}$
$9\frac{3}{4}$x$11\frac{3}{4}$

Rough Bark Edge Flitch 120 Pcs. 9x26 or wider 14'
" 240 Pcs. 9x24 or wider 12'
" 9x30 or wider 580 lin. ft.

9x27	"	2100	"
9x26	"	1600	"
9x24	"	1890	"
9x22	"	2910	"
9x20	"	4000	"
9x18	"	7100	"
9x16	"	1880	"
9x14	"	2500	"

These items to be in long length. The number of lineal feet of each width the flitch contains to be counted separately. No face to be less than 14".

30	Pcs.	3x9	—16'	848 to $2\frac{3}{4}$x$8\frac{3}{4}$
30	"	"	20'	"
5	"	10x10	26'	"
60	"	8x8	16'	"
10	"	"	14'	"
45	"	"	12'	"
20	"	"	10'	"

$9\frac{3}{4}$x$9\frac{3}{4}$
$7\frac{3}{4}$x$7\frac{3}{4}$
"
"
"

10	"	$6\frac{1}{4}$x12	22'	S2S	6x12	
10	"	"	24'	"	"	
10	"	"	28'	"	"	
10	"	"	32'	"	"	
10	"	"	36'	"	"	
10	"	"	38'	"	"	
90	"	"	40'	"	"	
10	"	"	42'	"	"	
30	"	"	44'	"	"	
10	"	"	48'	"	"	

$4\frac{1}{4}$x12—28 to 40' 6000 lin. ft. S2S to 4x12
8 x12—30 to 50' 16500 lin. ft. S2S to $7\frac{3}{4}$x12
7 x12—24 to 46' 7200 lin. ft. S2S to $6\frac{3}{4}$x12
$2\frac{1}{4}$x12— 1400 lin. ft. S2S to 2x12

10	Pcs.	6x9	40'	S4S	to	$5\frac{3}{4}$x$8\frac{3}{4}$
20	"	"	34'	"	"	"
10	"	"	30'	"	"	"
50	"	$4\frac{1}{4}$x8	42'	"	"	4x$7\frac{3}{4}$
50	"	"	40'	"	"	"
50	"	"	38'	"	"	"
50	"	"	32'	"	"	"
10	"	8x10	32'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
10	"	"	38'	"	"	"
20	"	"	40'	"	"	"
30	"	8x12	40'	S2S	"	$7\frac{3}{4}$x12
10	"	"	20'	"	"	"
10	"	$5\frac{1}{4}$x12	28'	"	"	5x12
10	"	"	36'	"	"	"
10	"	"	32'	"	"	"
10	"	"	40'	"	"	"
5	"	10x12	28'	S4S	"	$9\frac{3}{4}$x$11\frac{3}{4}$
15	"	"	30'	"	"	"
30	"	10x10	30'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
5	"	10x12	28'	"	"	$9\frac{3}{4}$x$11\frac{3}{4}$
35	"	10x10	28'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
25	"	"	26'	"	"	"
30	"	"	24'	"	"	"
10	"	"	22'	"	"	"
10	"	"	20'	"	"	"
10	"	"	18'	"	"	"

10	"	"	16'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
5	"	"	14'	"	"	"
10	"	10x10	12'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
30	"	"	10'	"	"	"
30	"	9x10	9'	"	"	$8\frac{3}{4}$x$9\frac{3}{4}$
20	"	10x12	6'	"	"	$9\frac{3}{4}$x$11\frac{3}{4}$
160	"	10x10	6'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	10x10	4'	"	"	"
20	"	10x14	4'	"	"	$9\frac{3}{4}$x$13\frac{3}{4}$

Send suitable lengths to cut these pieces.

60	"	10x10	3'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
35	"	8x10	28'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
15	"	"	26'	"	"	"
5	"	"	24'	"	"	"
10	"	10x10	24'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	8x10	22'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
15	"	"	20'	"	"	"
10	"	"	18'	"	"	"
5	"	"	16'	"	"	"
5	"	"	14'	"	"	"
5	"	10x10	14'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	6x10	12'	"	"	$5\frac{3}{4}$x$9\frac{3}{4}$
5	"	8x10	12'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$
5	"	8x10	8'	"	"	"
20	"	9x10	7'	"	"	$8\frac{3}{4}$x$9\frac{3}{4}$
5	"	8x10	6'	"	"	$7\frac{3}{4}$x$9\frac{3}{4}$

Send suitable lengths to cut these pieces.

10	"	10x10	24'	"	"	$9\frac{3}{4}$x$9\frac{3}{4}$
10	"	"	26'	"	"	"
10	"	"	30'	"	"	"

$4\frac{1}{4}$x12—20 to 46' 11080 lin. ft. S2S to 4x12
$4\frac{1}{4}$x 8—20 to 40' 13000 lin. ft. S2S to 4x8
$4\frac{1}{4}$x10—20 to 40' 15000 lin. ft. S2S to 4x10
$5\frac{1}{4}$x 8—20 to 40' 11200 lin. ft. S2S to 5x8

20	Pcs.	$5\frac{1}{4}$x12—	24'	S2S	to	5x12
20	"	"	30'	"	"	
20	"	"	36'	"	"	
40	"	"	40'	"	"	

$3\frac{1}{4}$x6 3400 lin. ft. S2S to 3x6
$3\frac{1}{4}$x4 5000 " " " 3x4

$4\frac{1}{4}$x6 1700 " " " 4x6
$2\frac{1}{4}$x4 1700 " " " 2x4
10 Pcs. 5x22" or wider 24' S2S $4\frac{3}{4}$" Thick—Bark Edges
20 " 5x24" " 24' " " "
10 " 5x18" " 24' " " "
10 " " " 46' " " "
10 " 5x22" " 36' " " "
5 " 5x24" " 16' " " "
$3\frac{3}{4}$x$4\frac{1}{4}$ 45000 Bd. ft. S4S $3\frac{1}{2}$x4 Edge Grain
Edge grain is to be on the four-inch side of the timber.
5 " 5x6—20' S2S to $4\frac{3}{4}$x6
10 " " 30' " "
10 " " 32' " "
10 " " 24' " "
15 " 5x14 10' " $4\frac{3}{4}$x14
5 " 5x16 8' " $4\frac{3}{4}$x16
$2\frac{1}{4}$x6—16 to 28' 6500 Bd. ft. S4S to 2x$5\frac{3}{4}$
20 " 5x18 14' S2S to $4\frac{3}{4}$x18
10 " " 18' " $4\frac{3}{4}$x16
20 " 5x16 24' " $4\frac{3}{4}$x16
10 " 5x14 30' " $4\frac{3}{4}$x14
10 " 5x16 18' " $4\frac{3}{4}$x16
10 " 5x18 12' " $4\frac{3}{4}$x18
15 " 5x22 18' " $4\frac{3}{4}$x22
10 " 5x12 14' " $4\frac{3}{4}$x12
10 " " 20' " "
10 " 5x14 18' " $4\frac{3}{4}$x14
10 " 5x6 28' " $4\frac{3}{4}$x6
10 " " 36' " "
10 " " 26' " "
5 " 5x18 8' " $4\frac{3}{4}$x18
10 " 5x16 10' " $4\frac{3}{4}$x16
5 " 12x16 16' S4S $11\frac{3}{4}$x$15\frac{3}{4}$
5 " " 14' " "
5 " " 12' " "
5 " 10x16 10' " $9\frac{3}{4}$x$15\frac{3}{4}$
5 " 16x16 7' " $15\frac{3}{4}$x$15\frac{3}{4}$
4x10 7500 bd. ft. Rough
$1\frac{1}{4}$x10 10500 bd. ft. Rough
5 " 12x12 22' S4S to $11\frac{3}{4}$x$11\frac{3}{4}$

5	"	12x12	28' "	"
45	"	9x9	20' "	$8\frac{3}{4}$x$8\frac{3}{4}$
45	"	"	18' "	"
10	"	12x14	28' "	$11\frac{3}{4}$x$13\frac{3}{4}$
10	"	"	24' "	"
10	"	"	22' "	"
10	"	"	20' "	"
10	"	"	18' "	"
20	"	12x12	18' "	$11\frac{3}{4}$x$11\frac{3}{4}$
5	"	14x14	36' "	$13\frac{3}{4}$x$13\frac{3}{4}$
5	"	"	28' "	"
5	"	"	22' "	"

The above being in all approximately 1,300,000'.

We are beginning work on the order today.

Shipment on the above schedules will begin within about two weeks. We will especially exert ourselves to ship the first of the above schedules very promptly and we will work toward getting the material on the other schedule shipped in the order you have indicated. However, as explained to Mr. Manley, we expect to ship any item on either of the schedules as soon as it is ready. We expect to complete the entire order in from four to six months.

The price will be $65.35 per 1000 B. M. F. O. B. cars our various mills.

Shipments will be made to you at Marine City, Michigan.

Terms will be cash less 2% within ten days from date of invoice.

Assuming that all above is in line with your understanding, we will ask you to accept and return one copy of this memorandum.

Yours truly,
Ingram Day Lumber Company.
Per Wilson.

Accepted:
S. C. McLouth.

EXHIBIT "B"

INGRAM DAY LUMBER COMPANY

Lyman, Miss., 2/5/19.

Sidney C. McLouth, Esq.,
Marine City, Michigan.

Dear Sir:—

Referring to enclosed formal memorandum of sale, we beg to say that our price of $65.35 is made up as follows:

Our price on the separate flitch schedule and the first three tug schedules which we made sometime since was $64.50 mill which we have held open by understanding with Mr. Manley. There is approximately 1,007,000' of the above.

Since that quotation was made the market has advanced sharply so that our price today on the two additional tug schedules which Mr. Manley is ordering is $67.00 mill. Of this there is approximately 520,000'. For convenience in invoicing we strike an average price on all of it as follows:

1007000'	at	$64.50	$64951.50
520000'	at	67.00	34840.00
Total 1527000'	at	65.35	$99791.50

We trust this is clear and satisfactory.

The business is appreciated very highly and we hope to have the pleasure of serving you often.

We specialize in the production of shipbuilding material and are always in position to get out difficult sizes in Yellow Pine and Oak.

Yours truly,
Ingram Day Lumber Company,
Per Wilson.

Accepted:
S. C. McLouth.

EXHIBIT "C"

SLYNEY C. McLOUTH

VESSELS

MARINE CITY, MICH.

1401 Lumber Exchange Bldg.
Chicago, Ill., Feb. 28, 1919.

Ingram-Day Lumber Co.,
Lyman, Miss.

Attention Mr. Mitchell.

Gentlemen:

I am just in receipt of advice from Marine City listing a few changes as directed by the American Bureau of Shipping as follows:

"Owing to the fact that the American Bureau of Shipping requires longer scarfs in the side, bilge and floor ceiling, it necessitates our using longer material. We wish you would have items 17, 18 and 19 on our last lumber schedule dated January 9th, 1919, changed to read as follows:

17—Side Ceiling	$4\frac{1}{4}$x12	1200 lin. ft.	828	40 to 50
18—Bilge "	8x12	3300 " "	"	40 to 50
19—Floor "	7x12	1440 " "	"	40 to 50

Then referring to items 29, 30, 31 and 32 of this same schedule, we would like to have the mills understand that we cannot use more than 15 per cent from 20 to 30 ft. long, and 25 per cent from 30 to 40 ft. long. The balance of these items are to be 40 to 46 ft. These items are the bottom plank, bilge plank, side plank and wale strake."

Will you kindly make the proper notations on your orders and see that the mills cutting same are instructed accordingly at once, acknowledging receipt of our instructions.

To date I have received but one invoice covering about 10 M' of flitch material, but trust that you have several cars on the way by this time. Please bear down all possible on this flitch stock, as the yard is badly in need of it.

Yours very truly,

JJM.AMB

Jno. J. Manley.

P. S. Assume all sticks will bear our item number on end for purpose of identification and to facilitate checking.

EXHIBIT "D"

INGRAM DAY LUMBER COMPANY

Lyman, Miss., March 3, 1919.

Mr. John J. Manley,
No. 1401 Lumber Exchange,
Chicago, Illinois.

My dear Mr. Manley:

We are this morning in receipt of your letter of the 28th, and are very sorry to note the changes which Mr. McLouth desires to have made in his schedule, especially as we find that these changes are of considerable moment and make the schedule vastly more difficult.

Change No. 1 item 17, the total board measure amounts to 25,500 ft. and changing the specification from 28 to 40 ft., making it read 40 to 50 ft., will render the item worth $20.00 per m ft. additional, or $510.00.

Change No. 2 item 18, the total board measure amounts to 132,000 ft., and changing the specification from 30 to 50' making it read 40 to 50' will render the item worth $10.00 per M. ft. additional or $1320.00.

Change No. 3 item 19, the total board measure amounts to 45,400 ft., and changing the specification from 24 to 40', making it read 40 to 50' will render the item worth $20.00 per M. ft. additional or $908.00.

Change No. 4, item 29, the total board measure amounts to about 45,000 ft., and changing the specification to new lengths will render this item worth $15.00 per M ft. additional or $675.00.

Change No. 5, items 30, 31 and 32, the total board measure amounts to approximately 130,000 ft., and changing the specification to new lengths will render this item worth $20.00 per M additional or $2600.00.

You will, therefore, perceive that we would want a total of $6013.00 to justify us in making all the changes asked for. We very much prefer having the schedule without these changes and we sincerely hope when you

have fully concluded the matter that you will instruct us accordingly. However, you have the figures before you and we await your advices concerning them.

Yours truly,

A. S. Mitchell,
General Manager.

ASM/W

EXHIBIT "E"

Telegram

Marine City, Mich.,
March 7, 1919.

Ingram Day Lumber Company,
Lyman, Miss.

Please make changes in items seventeen eighteen nineteen twenty nine thirty thirty one thirty two of ceiling and planking as per your proposition of March third.

S. C. McLouth.

DEFENDANT'S PLEA

(Filed Dec. 22, 1920).

Comes now the defendant, Sidney C. McLouth, by John E. Kinnane, United States Attorney for the Eastern District of Michigan, Southern Division, and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money demanded or any part thereof, and that he did not undertake and promise in the manner and form as the said plaintiff has in its

declaration and in each count thereof complained against him; and of this the defendant puts himself upon the country, etc.

John E. Kinnane,
United States Attorney.

STIPULATION WAIVING JURY

(Filed Sept. 18, 1923)

It is hereby stipulated and agreed, between the attorneys for the respective parties hereto, that a trial by jury in this action be and the same hereby is waived; and that the issues of fact herein may be tried and determined by the District Court of the United States for the Eastern District of Michigan, Southern Division, without the intervention of a jury; and that said court shall make special findings of fact herein, which shall have the same effect as the verdict of a jury, and also conclusions of law thereon.

Dated, July 6th, 1923.

Miller, Canfield, Paddock & Stone,
Plaintiff's Attorneys.
Earl J. Davis, U. S. Attorney,
Defendant's Attorney.
By F. L. Eaton,
Assistant.

SUGGESTION OF DEATH OF DEFENDANT

(Filed Nov. 15, 1923).

Now comes the plaintiff in the above entitled cause, by Miller, Canfield, Paddock & Stone, its attorneys, and causes the court to understand and to be informed that Sydney C. McLouth, the defendant in the above entitled cause, died on or about September 22nd, 1923, at Marine City, Michigan.

That on or about the 29th day of October, A. D. 1923, The American Loan & Trust Company of Detroit, Michigan, was appointed administrator of the estate of the said Sydney C. McLouth, defendant aforesaid, by the Probate Court of St. Clair County, Michigan, and that after said appointment the said The American Loan & Trust Company duly qualified as such administrator and is now the duly appointed, qualified and acting administrator of the estate of the said Sydney C. McLouth, as more fully appears from a certified copy of the letters of administration hereto attached and made a part hereof.

Now, therefore, the said plaintiff moves the court that an order be entered by this honorable court reviving said cause of action, and that the said The American Loan & Trust Company, as administrator of the estate of the said Sydney C. McLouth, be substituted as defendant in the above entitled cause and that a writ of scire facias issue to the said The American Loan & Trust Company, administrator as aforesaid, in accordance with the statute in such case made and provided.

This motion is based upon the records and files in said cause, upon the certified copy of letters of administration of the estate of Sydney C. McLouth and the affidavit of William J. Shaw, hereto annexed.

Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

State of Michigan, County of Wayne, ss:

William J. Shaw, being first duly sworn, deposes and says that he is associated with Miller, Canfield, Paddock & Stone, attorneys for the plaintiff in the above entitled cause, and that said Sydney C. McLouth, defend-

ant in the above entitled cause, died at Marine City, Michigan, or or about the 22nd day of September, A. D. 1923, as this deponent is informed and verily believes.

William J. Shaw.

Subscribed and sworn to before me this 15th day of November, A. D. 1923.

Bertha M. Waldron,
Notary Public, Wayne County, Michigan.
My commission expires Aug. 16, 1927.

ORDER APPOINTING ADMINISTRATOR

State of Michigan, the Probate Court for the County of St. Clair.

At a session of said court, held at the Probate Office in the City of Port Huron, in said county, on the 29th day of October, A. D. 1923.

Present, Hon. Clair R. Black, Judge of Probate.

In the matter of the estate of Sydney C. McLouth, deceased.

This day having been appointed for hearing the petition of Peirce McLouth, son of said deceased, praying that the administration of said estate be granted to The American Loan & Trust Company of Detroit, Mich., or to some other suitable person and due notice of the hearing on said petition having been given as directed by this court, the said petitioner appeared in person and by his attorney, H. L. Stevens.

It appearing to the court that the said deceased died on the 22nd day of September, A. D. 1923, intestate; that he was at the time of his death, an inhabitant of the City of Marine City in said county; that he left an estate within said county to be administered; that it is necessary that an administrator of said estate be appointed, and that The American Loan & Trust Company of the City of Detroit, in Wayne County is a competent and suitable person for that trust;

It is ordered, that the said American Loan & Trust Company of Detroit, Mich., be and is hereby appointed administrator of said estate, and that it give bond in

the penal sum of five hundred thousand ($500,000.00) dollars.

Clair R. Black,
Judge of Probate.

BOND OF ADMINISTRATOR

State of Michigan, the Probate Court for the County of St. Clair.

In the matter of the estate of Sidney C. McLouth, deceased.

Know all men by these presents, that we, American Loan & Trust Company of Detroit, Michigan, as principal and Detroit Fidelity and Surety Company of Detroit, Michigan, as surety within the State of Michigan, are held and firmly bound and obliged unto Clair R. Black, Judge of Probate in and for said county, in the full sum of five hundred thousand and no 100 ($500,000.00) dollars, lawful money of the United States of America, to be paid unto said judge of probate, his successors in said office or assigns, to the true payment whereof we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this thirty first day of October, A. D. 1923.

The condition of this obligation is such, that if the above bounden American Loan & Trust Company who has been appointed administrator of said estate, shall well and truly perform, observe and keep the conditions following, to wit:

1st. That they shall make and return to said court within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits, and estate of said deceased which shall come to their possession or knowledge, or to the possession of any other person for them.

2nd. That they shall administer according to law all the goods, chattels, rights, credits, and estate of said deceased which shall at any time come to their possession or to the possession of any other person for them and out of the same pay and discharge all debts and charges chargeable on the same, or such dividends thereof as

shall be ordered and decreed by said court;

3rd. That they shall render a true and just account of their administration to said court within one year, and at any time when required by said court;

4th. That they shall perform all orders and decrees of said court, by the said administrator to be performed in the premises; then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

American Loan & Trust Company,
Richard G. Lambrecht, Prest. (Seal)
P. O.
H. C. Jolly, Secretary. (Seal)
P. O.
Detroit Fidelity and Surety Company (Seal)
By Homer H. McKee, President (Seal)
Attest: Wm. J. Lewis, Asst. Secretary.

Note—Sureties on this bond must sign their names here and also on the back hereof, and justify before a notary public or justice.

State of Michigan, County of St. Clair, ss.

The Suret in the foregoing bond being duly sworn, each for himself, says that he is worth double the amount of the penalty in said bond, over and above all debts and legal exemptions in unencumbered property situated in said county.

(Surety sign here)
(Surety sign here)

Subscribed and sworn to before me, this day of A. D. 191

Notary Public, St. Clair County, Michigan.
My commission expires

I have examined and do approve the foregoing bond this 8th day of November, A. D. 1923.

Clair R. Black,
Judge of Probate.

LETTERS OF ADMINISTRATION

State of Michigan, the Probate Court for the County of St. Clair.

In the matter of the estate of Sydney C. McLouth,

deceased.

To American Loan & Trust Company, of the City of Detroit, Wayne County, Michigan, greeting:

You having been appointed administrator of said estate, and having given a bond in the premises which has been duly approved and filed as required by law, I do by these presents, commit unto you full power and authority to administer and faithfully dispose of, according to law, all and singular, the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate whatsoever of said deceased, which to him at the time of his death did belong; and to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said court; hereby requiring you to make and return to said court, within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits and real estate of said deceased which shall come into your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court within one year, and at least once in each year thereafter during your administration and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Port Huron, in said county, this 8th day of November, A. D. 1923.

Clair R. Black,
(Probate Court Seal) Judge of Probate.

EXEMPLIFICATION OF RECORD

State of Michigan, in the Probate Court for the County of St. Clair.

In the matter of the estate of Sydney C. McLouth, deceased.

I, Mildred E. Wright, Register of Probate, for said

county, having the legal custody of the files and records thereof, do hereby certify that I have compared the attached copy of order appointing administrator, bond of administrator and letters of administration, with the original thereof on file in said court, and have found the same to be a correct transcript therefrom, and the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Probate Court for said county, at the city of Port Huron, this 9th day of November, A. D. 1923.

Mildred E. Wright,
Register of Probate.

(Probate Court Seal)

APPEARANCE OF ADMINISTRATOR

(Filed Jan. 29, 1924).

To the Clerk:

Will you please enter my appearance for the American Loan and Trust Company, administrator, etc., defendant in the above entitled cause, said administrator having been substituted in the place of defendant Sidney C. McLouth, deceased.

F. L. Eaton,
Assistant United States Attorney.

To Miller, Canfield, Paddock & Perry, Attorneys for Plaintiff:

Please take notice that I have entered the appear-

ance of the administrator as defendant in the above entitled cause.

F. L. Eaton,
Assistant United States Attorney.

January 29, 1924.

PLEA OF THE AMERICAN LOAN AND TRUST COMPANY

(Filed Jan. 29, 1924).

And the said defendant, the American Loan and Trust Company, a Michigan corporation, administrator of the estate of Sidney C. McLouth, deceased, by Frederic L. Eaton, Assistant United States Attorney for the Eastern District of Michigan, comes and defends the wrong and injury when etc., etc., and says that the said Sidney C. McLouth, in his lifetime, and that said defendant since his decease did not, nor did either of them undertake or promise in manner and form as the plaintiff has complained against them, and that defendant demands a trial of the matter set forth in the plaintiff's declaration.

F. L. Eaton,
Assistant United States Attorney and Attorney for the American Loan & Trust Company, administrator.

January 28, 1924.

WAIVER OF TRIAL BY JURY

(Filed May 5, 1924).

It is hereby stipulated and agreed between the attorneys for the respective parties hereto, that a trial by jury in this action be and the same hereby is waived; and that the issues of fact herein may be tried and determined by the District Court of the United States for the Eastern District of Michigan, Southern Division, without the intervention of a jury; and that said court shall make special findings of fact herein, which shall have the same effect as the verdict of a jury, and also conclusions of law thereon.

Miller, Canfield, Paddock & Stone,
Plaintiff's Attorneys.
Delos G. Smith, U. S. Attorney,
By F. L. Eaton, Assistant,
Defendant's Attorneys.

Dated May 5, 1924.

REQUEST FOR FINDINGS OF FACT

(Filed May 19, 1924).

The plaintiff considering the facts hereinafter set forth to be proven, and deeming them material to the issues involved in this case, hereby requests the court to find the same as follows:

FIRST

That the plaintiff in this case is a Wisconsin cor-

poration. That the original defendant in this case was a citizen and resident of the State of Michigan. That after this cause was at issue the original defendant, Sydney C. McLouth, died; his death having been suggested to the court, said cause was properly revived against his administrator, The American Loan & Trust Company, a Michigan corporation.

SECOND

That on to-wit: February 5th, 1919, the plaintiff and said McLouth entered into a certain written contract, set forth as Exhibit "A" of plaintiff's declaration. This contract was slightly modified by a subsequent agreement between plaintiff and said McLouth, evidenced by letter of said McLouth's agent to plaintiff, dated Feb. 28, 1919, being Exhibit "C" of said declaration; plaintiff's letter to said McLouth dated March 3, 1919, being Exhibit "D" of said declaration; and telegram from said McLouth to plaintiff dated March 7, 1919, being Exhibit "E" of plaintiff's declaration; that under the terms of the contract of February 5th, 1919, as so modified, the plaintiff agreed to sell and the said McLouth agreed to buy 1,537,032 feet of especially cut and manufactured lumber at a contract price of $105,806.29.

THIRD

That prior to May 6th, 1919, in accordance with the said contract between the parties of February 5th, as modified, the plaintiff had prepared and shipped to said McLouth 617,366 feet of lumber, which lumber the said McLouth had accepted and paid for. (Depositions page 13).

FOURTH

On May 6, 1919, McLouth directed plaintiff to suspend further shipments and thenceforward refused performance of said contract on his part, although plaintiff

continued to tender performance of its obligations thereunder.

FIFTH

That when the plaintiff received the said McLouth's telegram of May 6th, 1919, the plaintiff had then completed the manufacture and preparation of 115,000 feet of lumber, except for dressing and loading costs, that it would have cost the plaintiff the sum of $400 to dress and load this 115,000 feet and that the resale value of this 115,000 feet of lumber amounted to the sum of $1,725. Deducting from the contract price the cost of dressing and loading, and the resale value of this particular 115,000 feet from the contract price of same, there is a balance due the plaintiff on this item amounting to the sum of $5,918.10. (Depositions pages 13-14-15).

SIXTH

That after deducting from the original contract the 617,366 feet set forth in the Third finding of fact and the 115,000 feet set forth in the Fifth finding of fact, the balance to be furnished under the contract amounted to 804,696 feet. (Depositions page 13).

SEVENTH

That on May 6th, 1919, the 804,696 feet set forth in the sixth finding of fact was still in the trees, but all original preparations for the manufacture of this lumber such as railroad facilities, the selection of the trees and the building of logging roads had been completed by the plaintiff. (Depositions pages 8 and 44-45).

EIGHTH

That it would have cost the plaintiff to complete the manufacture of the 804,696 feet of lumber referred to in the Sixth and Seventh findings of fact the sum of $19,400, which amount is derived from the total of the following items:

For	Timber	$10,000.00	
"	Logging	4,800.00	
"	Milling	2,500.00	
"	Dressing	1,300.00	
"	Loading	800.00	$19,400.00

(Depositions pages 21 and 46-47-48).

NINTH

That the contract price of the 804,696 feet referred to in the Sixth, Seventh and Eighth findings of fact amounted to the sum of $56,271.86. Deducting from the contract price the cost of manufacturing this lumber as appears from the Eighth finding of fact, I find a balance due to the plaintiff on this item amounting to the sum of $36,871.86.

TENTH

That the plaintiff was at all times able, ready and willing to perform the contract on its part, but said McLouth refused further performance on his part as found in the Fourth finding above.

ELEVENTH

That prior to entering into the contract of February 5th, 1919, the defendant furnished plaintiff certain schedules showing the size and quality of lumber required by the defendant, I find that these schedules nowhere mention that defendant had a contract with the United States Government or any agency thereof.

TWELFTH

That the contract of February 5th, 1919, between plaintiff and McLouth and the subsequent modifications thereof, contain no provision whatsoever providing for cancellation thereof.

THIRTEENTH

That the contract of February 5th, 1919, between

plaintiff and McLouth and the subsequent modifications thereof nowhere mention that McLouth had a contract with the United States Government, or any agency thereof.

FOURTEENTH

I further find that the first knowledge plaintiff had that McLouth was engaged in fulfilling a contract with the United States Government or any agency thereof, was after the receipt by plaintiff of a telegram from McLouth under date of May 6, 1919.

FIFTEENTH

That the United States Government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract of February 5th, 1919, between plaintiff and McLouth.

CONCLUSION OF LAW

FIRST

That the pleas filed on behalf of Sydney C. McLouth and the American Loan and Trust Company, administrator of the estate of Sydney C. McLouth, deceased, were pleas of non assumpsit, no notices of special defense having been attached to the pleas under Rule 44 of this court. All evidence of McLouth's dealings with the United States Government, or any agency thereof, is inadmissible and is excluded.

SECOND

There being no privity of contract between plaintiff and the United States Government, or any agency thereof, and the United States Government never having cancelled, modified, suspended or requisitioned the contract between plaintiff and McLouth, the Act of June 15th, 1917, (40 United States Statutes at Large 182), has no application to the facts in this case.

THIRD

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to judgment in the sum of $42,789.96, together with interest at 5% from August 5, 1918.

Respectfully submitted,

White & Ford,

Miller, Canfield, Paddock & Stone,

Attorneys for Plaintiff.

PETITION FOR LEAVE TO AMEND PLEA

(Filed Aug 12, 1924).

Now comes the above defendant by F. L. Eaton, Assistant United States Attorney for said District, and I. V. McPherson, Special Assistant to the Attorney General, and prays the court for leave to file an amended plea, a copy of which proposed amended plea is hereto attached. This motion is based upon the files, records and testimony in this case.

F. L. Eaton,

Assistant United States Attorney.

August 12, 1924.

AMENDED PLEA

(Filed Aug. 12, 1924).

For amended plea, comes now defendant, American Loan and Trust Company, administrator, estate of Sidney C. McLouth, deceased, by F. L. Eaton, Assistant United States Attorney for the Eastern District of Michigan, Southern Division, and I. V. McPherson, Special Assistant to the Attorney General, and defends the wrong and injury when etc., and says that defendant does not owe the said sum of money demanded, or any part thereof, and that the deceased, Sidney C. McLouth did not undertake and promise in the manner and form as the said plaintiff has stated in its declaration, and in each count thereof complained against him, and of this defendant puts itself upon the country, etc.

Frederic L. Eaton,
Assistant United States Attorney.
I. V. McPherson,
Special Assistant to the Attorney General,
Attorneys for Defendant.

To the above named plaintiff and its attorneys:

Please take notice that the defendant in the above entitled cause, upon the trial thereof, will give in evidence and insist in its defense, in addition to a denial of each and all of the allegations and matters set forth in plaintiff's declaration in the above entitled cause:

I.

That under and by virtue of the provisions of what is known as the "Shipping Fund Provision" of the Urgent Deficiencies Appropriation Act, approved June 15, 1917, the President of the United States was authorized and empowered, among other things, to place an order with any person or persons for such ships or materials as the necessities of the government, to be determined by the President, might require, during the war, and which were of the nature, kind and quality usually produced or capable of being produced by such person or persons.

II.

That under and by virtue of the provisions of the aforesaid act of Congress, the President was given full power and authority to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or of materials.

III.

That by virtue of the provisions of said act of Congress, compliance with all orders issued thereunder was made obligatory on any person to whom the same was given, and the person to whom such order was given, was required to give the same precedence over all other orders and contracts placed with such person.

IV.

That by virtue of the provisions of such Appropriation Act, whenever the United States should cancel any contract for the purchase of ships or materials, it was provided that just compensation should be made therefor, by the President, and that if the amount of such compensation, as determined by the President, was unsatisfactory to the person entitled to receive the same, in such case it was provided that the President should pay to the person entitled to receive such compensation, seventy-five per cent of the same, so determined by him, and the person to whom the same was due, was entitled to sue the United States to recover such further sum as added to said seventy-five per cent would make up such an amount as would be just compensation to such person.

V.

That under and by virtue of the said "Shipping Fund Provision" of the said Act of Congress, the President was authorized to exercise the power and authority vested in him thereby, through such agents or agencies as he might determine.

VI.

That under and pursuant to the authority conferred upon him by the aforesaid Act of Congress, the President of the United States, by executive order, dated July 11, 1917, directed that the United States Shipping Board Emergency Fleet Corporation should have and exercise all the power and authority vested in him by the said Act of Congress aforesaid, insofar as the same authorized and empowered him to place orders for ships or materials, and all power and authority conferred upon him by said Act of Congress, to modify, suspend, cancel, or requisition existing or future contracts for the building, production, or purchase of ships or of materials therefor.

VII.

That, thereafter, and pursuant to the authority conferred upon it by the President's executive order, and acting within the scope of its authority thereunder, on August 21, 1917, acting for and on behalf of the United States, the United States Shipping Board Emergency Fleet Corporation made and entered into a contract with one Sidney C. McLouth, by the terms of which the said McLouth agreed to construct for the United States, four wooden ocean-going tugs for the price and sum of $232,000.00 each; and pursuant to the authority conferred upon it in said executive order, and acting within the scope of its agency powers, on September 17, 1917, said United States Shipping Board Emergency Fleet Corporation entered into an additional contract with the said Sidney C. McLouth, whereby the latter agreed to construct five wooden ocean-going tugs for $232,000.00 each.

VIII.

That, after entering into said contracts for the construction of the said tugs, the said Sidney C. McLouth immediately entered upon the performance of the same, and to procure the necessary materials for the construction thereof, on February 5, 1919, he entered into the

contract declared on in this action, between himself and the plaintiff.

IX.

That, all lumber manufactured by the plaintiff in accordance with the contract sued on, and put on board the cars in accordance with the terms thereof, prior to May 6, 1919, had been fully paid for by the said Sidney C. McLouth, at the contract price, and that by the terms of the said contract, no sum or amount was due or owing from the said Sidney C. McLouth to the plaintiff, on the said 6th day of May, 1919. No additional lumber than that which had been delivered and paid for in full, at the contract price, had been manufactured so as to entitle plaintiff under the terms of the contract sued on, to deliver the same, or so that the said Sidney C. McLouth would have been compelled by the terms of said contract, to receive and accept the same.

X.

That on April 29, 1919, the United States, acting by and through the United States Shipping Board Emergency Fleet Corporation, notified said Sidney C. McLouth to suspend all work on the tugs contracted for and to order all work stopped on commitments made by him as to those hulls, and to make no further commitments or expenditures as to them, and thereafter, on May 6, 1919, in obedience to the said notice and order, issued to him by the United States, by and through said United States Shipping Board Emergency Fleet Corporation, the said Sidney C. McLouth suspended the contract between himself and the plaintiff, and then and there notified plaintiff that his contract with the government for the construction of said tugs had been canceled, and notified plaintiff to stop further shipments of lumber under the contract entered into between himself and the plaintiff, and sued on in this action.

XI.

That, thereafter, on September 18, 1919, the United

States, acting by and through the United States Shipping Board Emergency Fleet Corporation, finally canceled the contracts entered into for the construction of said tugs, and ordered and directed the said Sidney C. McLouth, to notify all sub-contractors that his said contracts were definitely canceled, and to make no further contracts, and to incur no further expenditures in reference to said tugs.

XII.

That after the plaintiff was notified, on May 6, 1919, that the contract between McLouth and the government had been suspended, and after it was ordered to make no further shipments under the contract sued on, it accepted notice of the cancellation, and thereafter it neither manufactured nor shipped any of the lumber remaining to be manufactured and shipped under the said contract, and did not complete the manufacture of the lumber on which it was then engaged, or prepare any part of the same for delivery to defendant under said contract, but on the contrary, on account of the size and lengths of the ship timbers, it was then engaged in manufacturing, plaintiff remanufactured the same into such usual sizes, lengths, and dimensions as were saleable in its ordinary trade, and sold the same on its own account in the usual course of its business.

XIII.

That all of the lumber to be manufactured and delivered under the said contract was procured by the said McLouth to be used in the manufacture of the said tugs, which the said McLouth was constructing for the government under the said contract entered into between himself and the said United States Shipping Board Emergency Fleet Corporation, and it was to be specially cut and manufactured as ship timber, all of which the plaintiff at all times well knew.

XIV.

That, in entering into the contracts for the construction of the tugs, between itself and the said Sidney C. McLouth, and in suspending and canceling said contracts, and in directing the said Sidney C. McLouth to suspend his contract with the plaintiff, and to make no further contracts, commitments, or expenditures in relation to the said tugs, the said United States Shipping Board Emergency Fleet Corporation was acting as, and only as the agent and delegate of the President of the United States, and within the scope of its agency power under and by virtue of the authority conferred upon it by the executive orders of the President of the United States.

That the contract entered into between the plaintiff and the said Sidney C. McLouth and sued on in this action, was not breached by the said Sidney C. McLouth, but the said contract was frustrated and rendered legally impossible to be performed by the parties thereto, without the fault of either, and that the said Sidney C. McLouth was prevented from continuing in the performance of the same, and was prevented from accepting the balance of the lumber to be manufactured and delivered under the said contract sued on, by the intervention, direction, and command of the government of the United States, acting by and through the United States Shipping Board Emergency Fleet Corporation.

Frederic L. Eaton,
Asst. U. S. Attorney,
I. V. McPherson,
Attorneys for Defendant.

OPINION OF THE COURT WITH FINDINGS OF FACT

(Filed June 1, 1925).

Action at law for breach of contract.

White & Ford; Miller, Paddock, Canfield & Stone, for plaintiff.

Frederick L. Eaton, Assistant U. S. Attorney, Chauncey G. Parker, I. V. McPherson, of counsel, for defendant.

Simons, District Judge, plaintiff, a Wisconsin Corporation, entered into written contract with McLouth, a resident of Michigan, now deceased, on February 5th, 1919, whereby plaintiff would sell McLouth certain quantities of cut and manufactured lumber according to certain specifications furnished to plaintiff, the lumber to be used by McLouth in the building of tugs. McLouth, at the time of entering into the contract with plaintiff, had two contracts with U. S. Shipping Board Emergency Fleet Corporation for the construction of nine ocean going tugs. On or shortly before May 6th, 1919, McLouth received a telegram from the Fleet Corporation suspending further operations on his contract, whereupon, under date of May 6th, 1919, his purchasing agent wired plaintiff as follows:

"Ingram Day Lumber Co.,

McLouth advised tugs contract cancelled. Stop further shipment pending instructions.

(Signed) John J. Manley."

Under date of September 17th, 1919, the Fleet Corporation by letter formally cancelled McLouth's contract. At the time of cancellation plaintiff's contract was partly performed, and partly unperformed. It brings this suit to recover among other items of damage, its loss of profits upon the unfulfilled portion of the contract. The suit was tried without a jury, and McLouth's contracts with the Fleet Corporation, the telegrams and letters to him from the Fleet Corporation suspending and cancelling the contract, were received in evidence, subject to the objection of the plaintiff that they were not material to the issues involved in the case. To the declaration filed in the suit against McLouth, and in the revived

suit against his personal representative after decease, the defendant pleaded the general issue. Some time after the case was heard and submitted defendant moved for leave to file an amended plea, setting up facts in relation to the making of the ship contracts with the Fleet Corporation and the cancellation thereof, to which motion plaintiff formally objected.

FINDINGS OF FACT

Upon consideration of the evidence, I have arrived at the following findings of fact:

(1) That at the time plaintiff's contract was entered into with McLouth the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

(2) That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.

(3) That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract.

Before giving consideration to the principal issue of law involved, I dispose of the defendant's motion for leave to file an amended plea and the objection thereto. This case was tried without a jury. The defense sought to be pleaded in the amended plea was fully anticipated by the plaintiff, and was quite fully met both by evidence and argument. It did not at the time of trial claim surprise, and has not since asked to have the case reopened for the purpose of introducing further evidence to meet the issues raised by the proposed amended plea. It seems to me clear that the interests of justice demand, and that in the proper exercise of sound judicial discretion, that I ought to grant the motion of the defendant, and the objection to it is overruled.

The principal question involved is whether the plain-

tiff is entitled to recover its lost profits under the contract, it being contended by the plaintiff that the contract was breached by McLouth, and it being contended by the defendant that there was no breach, but that the contract was cancelled or frustrated by the action and under the direction of competent authority.

The case was ably argued and ably briefed by counsel both for plaintiff and defendant. Not stopping to discuss for the purpose of this determination the many cases which throw light on the so-called doctrine of frustration, or impossibility of performance resulting from the acts of the sovereign or competent authority, and which have been well classified by the plaintiff as, first charter party cases, where the vessel chartered has been taken over by the English or American government. Second, contracts directly with the United States government. Third, the English coronation cases. I come to the somewhat narrow issue of law presented, which may for the purpose of conciseness be stated as follows:

Does the Urgency Deficiencies Appropriation Act of June 15th, 1917, authorize the President, through his properly delegated agents, to cancel a contract between private persons for supplying material for ships to be built for the Emergency Fleet Corporation, and is such cancellation effective as to a party not advised of the purpose of, and parties to the ship building contract?

The Act of June 15th, 1917, relating to war time powers of the President, authorized the President to cancel through governmental agencies contracts for the purchase of ships or ship material. The power and authority thus vested in the President was delegated by him from time to time to the United States Shipping Board, Emergency Fleet Corporation. Principal reliance is placed by each party upon a decision of a Circuit Court of Appeals, in which the facts seem to approximate the facts in the instant case, the plaintiff relying upon.

American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, decided June 27th, 1923, certiorari denied October 23rd, 1923, 263 U. S. 709, and the defendant relying upon.

Todd Drydock and Construction Corporation vs. Sumner Iron Works, 289 Fed. 217, decided May 7th, 1923, certiorari denied October 8th, 1923, 263 U. S. 700.

In the latter case the Circuit Court of Appeals for the Ninth Circuit apparently reached a conclusion different from that of the Circuit Court of Appeals for the Seventh Circuit in the former case. The Todd case, first decided, does not appear to have been considered in the Chain Company case, and is not cited therein.

The facts in each of the cases referred to are sufficiently set up in the opinions, and I will not restate them. The holding of the Todd case was to the effect that the authority conferred on the President by the Act of June 15th, 1917, to cancel any existing or future contract for the building, production or purchase of ships or material, is without limitation or restriction. A careful analysis of the Chain Company case would seem to indicate that it is not in conflict with the Todd case. In the former no government agency cancelled the contract in suit, or directed or required the original contractors to modify or cancel the contract. The contract was for a large quantity of standard material, only a small portion of which would have been used in completing buyer's contract with the Fleet Corporation, the court holding the inference to be not strained that the bulk of buyer's business was in making chains other than the anchor chains being supplied to the government.

It is vigorously urged, however, on the part of the plaintiff, that the circumstance in the instant case which brings it under the holding of the Chain Company case, and excludes it from the effects of the holding in the Todd case, is that in the instant case the plaintiff had no knowledge that the material furnished was to be used in fulfillment of a contract by McLouth with the Emergency Fleet Corporation, and that the statute referred to cannot be read into its contract unless the purpose for which the material was to be used was within the contemplation of the parties to the contract. It would appear, however, even in the Chain Company case, relied upon by plaintiff, that the seller's knowledge as to the purpose for which the material was to be used was con-

sidered immaterial. In view of the foregoing I am of the opinion that the instant case is ruled by the decision in the Todd case, and not by the decision in the Chain Company case.

Judgment may be entered in favor of the plaintiff, and as against the defendant, for such compensation as may adequately compensate the plaintiff, not to include profits lost upon the unfulfilled portion of the contract. This amount I have already indicated has been found to be the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract, May 6th, 1919.

Charles C. Simons,
U. S. District Judge.

Detroit, Mich., May 29, 1925.

JUDGMENT

(Entered June 1, 1925, by Simons, J.)

This cause having been heretofore duly noticed and coming on for hearing, and the court having heard the proofs adduced and the arguments of counsel for respective parties, and the matter submitted with leave to file briefs, and briefs having been filed, and the court having taken time to carefully read and consider the briefs submitted, and being fully advised in the premises, does now here,

Order that plaintiff recover from defendant damages in the sum of six hundred forty-seven dollars and sixty-five cents ($647.65), with interest from the date of the suspension of the contract, to-wit: May 6th, A. D.

1919, together with costs to be taxed, and that plaintiff have execution therefor.

ORDER EXTENDING TIME FOR SETTLING BILL OF EXCEPTIONS

(Entered June 19, 1925).

On motion of Miller, Canfield, Paddock & Stone, attorneys for the plaintiff in the above entitled cause, it is ordered that the time for settling the bill of exceptions in the above entitled cause, may be and hereby is extended sixty (60) days.

Dated June 19, 1925.

Charles C. Simons,
U. S. District Judge.

BILL OF EXCEPTIONS

(Filed Aug. 3, 1925).

The issue joined between the parties in this case having been brought on to be heard on the 8th day of May, A. D. 1924, before the Honorable Charles C. Simons, District Judge, and both parties being ready, and a jury having been duly waived, counsel for plaintiff—to maintain said issue on its part—offered in evidence the contract sued upon, in words and figures as follows:

"INGRAM-DAY LUMBER COMPANY

Lyman, Miss., 2/5/1919.

Sydney C. McLouth, Esq.,
Marine City, Michigan.

Dear Sir:

In accord with verbal understanding this day had with your Mr. Jno. J. Manley, we are entering your order as follows. From your schedule dated 12/13/18 headed "Balance of Flitches required to complete four tugs."

Dense Merchantable Yellow Pine

Rough, Bark Edge Flitch 192 pcs. 9x27 or wider 8'
" " " " 9x30 or wider 300' lin.
" " " " 9x26 or wider 1280' "
" " " " 9x24 or wider 868' "
" " " " 9x22 or wider 2153' "
" " " " 9x20 or wider 1977' "
" " " " 9x18 or wider 4032' "

These items to be in long lengths, the number of lineal feet of each width the Flitch contains to be counted separately. No face to be less than 18".

" " " " 16 pcs 10x30 or wider 8'
" " " " 16 pcs 10x30 or wider 9'
" " " " 16 pcs 10x30 or wider 10'
" " " " 48 pcs 10x18 or wider 4'
" " " " 48 pcs 10x18 or wider 6'
" " " " 48 pcs 10x18 or wider 8'
" " " " 48 pcs 10x16 or wider 8'

The above being in all approximately 227,000'.

And from your schedule dated 1/9/19 headed contract No. 457 W. C. Timber order for Tugs, etc.

Dense Merchantable Yellow Pine

15 Pcs. 14x14 46' S4S to 13¾x13¾
5 " " 16' " "
5 " " 38' " "
10 " " 46' " "
5 " " 16' " "

10	"	12x14	28' "	11¾x13¾
10	"	"	46' "	"
5	"	"	14' "	"
20	"	"	46' "	"
5	"	"	38' "	"
5	"	"	28' "	"
5	"	14x16	20' "	13¾x15¾
5	"	14x14	14' "	13¾x13¾
5	"	12x12	14' "	11¾x11¾
5	"	"	16' "	"
10	"	10x10	18' "	9¾x 9¾
5	"	14x14	14' "	13¾x13¾
5	"	"	22' "	"
5	"	10x14	10' "	9¾x13¾
10	"	10x12	44' "	9¾x11¾

Rough Bark Edge Flitch		120 Pcs. 9x26 or wider	14'
"		240 Pcs. 9x24 or wider	12'
"		9x30 or wider	580 lin. ft.
"		9x27 "	2100 "
"		9x26 "	1600 "
"		9x24 "	1860 "
"		9x22 "	2910 "
"		9x20 "	4000 "
"		9x18 "	7100 "
"		9x16 "	1880 "
"		9x14 "	2500 "

These items to be in long length. The number of lineal feet of each width the flitch contains to be counted separately. No face to be less than 14".

30	Pcs.	3x9	—16' S4S	to 2¾x8¾
30	"	"	20' "	"
5	"	10x10	26' "	9¾x9¾
60	"	8x8	16' "	7¾x7¾
10	"	"	14' "	"
45	"	"	12' "	"
20	"	"	10' "	"

10 " 6¼x12 22' S2S 6x12
10 " " 24' " "
10 " " 28' " "
10 " " 32' " "
10 " " 36' " "
10 " " 38' " "
90 " " 40' " "
10 " " 42' " "
30 " " 44' " "
10 " " 48' " "

4¼x12—28 to 40' 6000 lin. ft. S2S to 4x12
8 x12—30 to 50' 16500 lin. ft. S2S to 7¾x12
7 x12—24 to 46' 7200 lin. ft. S2S to 6¾x12
2¼x12— 1400 lin. ft. S2S to 2x12

10 Pcs. 6x9 —40' S4S to 5¾x8¾
20 " " 34' " " "
10 " " 30' " " "
50 " 4¼x8 42' " " 4x7¾
50 " " 40' " " "
50 " " 38' " " "
50 " " 32' " " "
10 " 8x10 32' " " 7¾x9¾
10 " " 38' " " "
20 " " 40' " " "
30 " 8x12 40' S2S " 7¾x12
10 " " 20' " " "
10 " 5¼x12 28' " " 5x12
10 " " 36' " " "
10 " " 32' " " "
10 " " 40' " " "
5 " 10x12 28' S4S " 9¾x11¾
15 " " 30' " " "
30 " 10x10 30' " " 9¾x9¾
5 " 10x12 28' " " 9¾x11¾
35 " 10x10 28' " " 9¾x9¾
25 " " 26' " " "
30 " " 24' " " "
10 " " 22' " " "
10 " " 20' " " "
10 " " 18' " " "

10	"	"	16'	" "	9¾x9¾
5	"	"	14'	" "	"
10	"	10x10	12'	" "	9¾x9¾
30	"	"	10'	" "	"
30	"	9x10	9'	" "	8¾x9¾
20	"	10x12	6'	" "	9¾x11¾
160	"	10x10	6'	" "	9¾x9¾
10	"	10x10	4'	" "	"
20	"	10x14	4'	" "	9¾x13¾

Send suitable lengths to cut these pieces.

60	"	10x10	3'	" "	9¾x9¾
35	"	8x10	28'	" "	7¾x9¾
15	"	"	26'	" "	"
5	"	"	24'	" "	"
10	"	10x10	24'	" "	9¾x9¾
10	"	8x10	22'	" "	7¾x9¾
15	"	"	20'	" "	"
10	"	"	18'	" "	"
5	"	"	16'	" "	"
5	"	"	14'	" "	"
5	"	10x10	14'	" "	9¾x9¾
10	"	6x10	12'	" "	5¾x9¾
5	"	8x10	12'	" "	7¾x9¾
5	"	8x10	8'	" "	"
20	"	9x10	7'	" "	8¾x9¾
5	"	8x10	6'	" "	7¾x9¾

Send suitable lengths to cut these pieces.

10	"	10x10	24'	" "	9¾x9¾
10	"	"	26'	" "	"
10	"	"	30'	" "	"

4¼x12—20 to 46' 11000 lin. ft. S2S to 4x12
4¼x 8—20 to 40' 13000 lin. ft. S2S to 4x8
4¼x10—20 to 40' 15000 lin. ft. S2S to 4x10
5¼x 8—20 to 40' 11200 lin. ft. S2S to 5x8

20	Pcs.	5¼x12—24'		S2S	to 5x12
20	"	"	30'	"	"
20	"	"	36'	"	"
40	"	"	40'	"	"

3¼x6 3400 lin. ft. S2S to 3x6
3¼x4 5000 " " " 3x4

4¼x6 1700 " " " 4x6
2¼x4 1700 " " " 2x4

10 Pcs. 5x22" or wider 24' S2S 4¾" Thick—Bark Edges
20 " 5x24" " 24' " " "
10 " 5x18" " 24' " " "
10 " " " 46' " " "
10 " 5x22" " 36' " " "
5 " 5x24" " 16' " " "

3¾x4¼ 45000 Bd. ft. S4S 3½x4 Edge Grain
Edge grain is to be on the four-inch side of the timber.

5 " 5x6—20' S2S to 4¾x6
10 " " 30' " "
10 " " 32' " "
10 " " 24' " "
15 " 5x14 10' " 4¾x14
5 " 5x16 8' " 4¾x16

2¼x6—16 to 28' 6500 Bd. ft. S4S to 2x5¾

20 " 5x18 14' S2S to 4¾x18
10 " " 18' " 4¾x16
20 " 5x16 24' " 4¾x16
10 " 5x14 30' " 4¾x14
10 " 5x16 18' " 4¾x16
10 " 5x18 12' " 4¾x18
15 " 5x22 18' " 4¾x22
10 " 5x12 14' " 4¾x12
10 " " 20' " "
10 " 5x14 18' " 4¾x14
10 " 5x6 28' " 4¾x6
10 " " 36' " "
10 " " 26' " "
5 " 5x18 8' " 4¾x18
10 " 5x16 10' " 4¾x16
5 " 12x16 16' S4S 11¾x15¾
5 " " 14' " "
5 " " 12' " "
5 " 10x16 10' " 9¾x15¾
5 " 16x16 7' " 15¾x15¾

4x10 7500 bd. ft. Rough
1¼x10 10500 bd. ft. Rough

5 " 12x12 22' S4S to 11¾x11¾

your message to Marine City as I am unable to give you further details than mentioned in my telegram, namely that tug contracts had been cancelled, and that you were to stop shipments pending further instructions. I presume that an effort will be made to reinstate the contracts, but have no information whatever on the subject.

John J. Manley."

that following the receipt of the telegram and the above letter Mr. Manley visited plaintiff's offices and an interview between the witness and Mr. Manley took place, at which interview the witness proposed that plaintiff would accept cancellation for the unshipped balance, provided it was paid for its losses including the loss of anticipated profits, on that part of the contract unperformed, which offer of plaintiff was not accepted; that thereafter the United States Shipping Board Emergency Fleet Corporation requested plaintiff to furnish a statement of its actual expenses incurred under the contract which plaintiff refused to do, insisting upon its right to anticipated profits; that after May 6, 1919, no lumber was manufactured for delivery under the contract; that the 115,000 feet upon which plaintiff was engaged at that date was never completed for delivery under the contract, but was remanufactured into sizes and dimensions suitable for sale in plaintiff's regular trade and was sold in the ordinary course of its business; an effort was made to secure a reinstatement of McLouth's contracts which effort failed; the 115,000 feet was not remanufactured or sold until after the final cancellation of the contract; that the fair market value of 115,000 feet upon which plaintiff was engaged on May 6, 1919, was $1,725.00; that the cost to plaintiff of completing the manufacture and loading on the cars, of the lumber remaining to be manufactured under the contract would have been:

For timber	$10,000.00
For logging	4,800.00
For milling	2,500.00
For dressing	1,300.00
For loading	800.00
Total	$19,400.00

that deducting from the total contract price of the lumber remaining to be manufactured the cost of manufacturing the same would have left plaintiff a profit for completing the contract of $42,789.96.

Plaintiff offered in evidence deposition of

F. W. PETTIBONE,

who testified substantially as follows:

That he has been engaged in the lumber business for thirty years and upwards; that at the present time he is manager for the Edward Hines Yellow Pine Trustees, manufacturing and selling yellow pine lumber; that he was familiar with the bill of lumber ordered by McLouth from the plaintiff; that the fair market value of the 115,000 feet of lumber in the condition in which it was at the time the contract was suspended was $1,725.00 that the cost of manufacturing lumber including stumpage, overhead, logging, dressing, loading and all proper items of cost for the first six months of 1919 was $25.00 per thousand feet.

Plaintiff then offered in evidence the deposition of

A. S. MITCHELL,

who testified substantially as follows:

That he is secretary and general manager of the plaintiff and that he has been engaged in the lumber business for more than twenty years; that he is familiar with the terms and conditions of the contract entered into on February 5, 1919, between plaintiff and Sidney C. McLouth; that after entering into said contract plaintiff immediately entered upon performance thereof and between February 5, 1919, and May 6, 1919, did manufacture and deliver F. O. B. cars at its mills 617,336 feet of lumber as called for by said contract, all of which was accepted by Mr. McLouth and paid for at the contract price; that prior to May 6, 1919, in addition to the lumber that had been manufactured and delivered, plaintiff had partially manufactured 115,000 feet more; that the only thing remaining to be done on the 115,000 feet to complete the manufacture of the same was dressing and

that by the expenditure of about $400.00 more plaintiff could have completed the manufacture thereof and loaded the same on the cars at its mills; that the salvage value of the 115,000 feet on May 6, 1919, was about $1,725.00; that plaintiff could have completed the manufacture of the balance of the lumber called for under the contract at the cost of $19,400.00, which deducted from the contract price of the lumber remaining to be manufactured would leave $42,789.96, the amount plaintiff would have made as profit if it had been allowed to complete the contract; that after the receipt of the telegram of May 6, 1919, and the letter of May 7, 1919, from John J. Manley no further lumber was actually manufactured under the contract; that the 115,000 feet upon which plaintiff was then engaged was never completed under the contract, but that the same was remanufactured into different sizes and dimensions and sold in plaintiff's regular trade.

Plaintiff then offered in evidence the deposition of

H. N. RUSSELL,

who testified substantially as follows:

That he had been engaged in the lumber business for approximately twenty years; that he had examined the bill of lumber ordered by McLouth from plaintiff and that, from his experience as a lumber man in the south, in his opinion the cost of manufacturing the lumber remaining to be manufactured under the contract would be substantially as testified to by Mr. Wilson and Mr. Mitchell.

The defendant, to maintain and prove the issue on its part called as a witness

JOHN J. MANLEY,

who being duly sworn, testified substantially as follows:

That he is a resident of Chicago, Illinois, and during the years 1918 and 1919, was engaged in the lumber business at Chicago; that during that time he was acting as purchasing agent for Sidney C. McLouth and that he carried on the preliminary negotiations with Ingram

Day Lumber Company, on behalf of McLouth, which resulted in the contract of February 5, 1919; that his recollection was that the original schedules or specifications of lumber as submitted to the plaintiff, showed on their face that the tugs were being built for the government. He also testified that in the negotiations he orally informed plaintiff's officers that the tugs for which the lumber was intended were tugs being built for the government.

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said witness, being presented with said schedules or specifications, testified that these schedules showed the lumber was required for tugs, but nowhere showed that they were for government tugs; and that he could not say that any of the schedules which came to the Ingram-Day Lumber Company had any reference to the tugs being government tugs; he also stated that he could not state positively that he informed plaintiff's officers orally, prior to the execution of the contract of February 5, 1919, that the lumber was required to be used in tugs being constructed for the government.

He testified that a flitch as referred to in the specifications for the lumber ordered is a plank sawn right through the log with the bark on, not being edged up and is used in the ribs of the hull of a ship or tug. Before the flitch is used in a vessel the bark is all taken off by the lines cut by the ship manufacturer.

The defendant then offered in evidence two contracts dated respectively, August 21, 1918, and September 17, 1918, which said contracts were marked "Defendant's Exhibit Nos. 6 and 7," respectively.

To the introduction of each of said contracts plaintiff, by its counsel, did then and there object for the reason that each of said contracts were immaterial to the issues in this case the plaintiff having no privity of contract with the United States Shipping Board Emergency Fleet Corporation; not being shown to have any knowledge of these contracts at the time of entering into the contract upon which this suit is brought. The court over-

ruled plaintiff's said objection to the introduction of each of said contracts and each of said contracts was received in evidence and counsel for the plaintiff then and there duly accepted to the ruling and decision of the court.

Said Exhibit No. 6 was in part as follows:

"Contract No. 457—W. C. Hull Nos. 2415-2418 Incl.

Contract made this twenty-first day of August nineteen hundred eighteen, between Sidney C. McLouth, an individual, party of the first part (herein called the contractor) and the United States Shipping Board Emergency Fleet Corporation, corporation organized under the laws of the District of Columbia, (herein called the owner) representing the United States of America party of the second part. * * * * *"

Subsequent clauses provide for the construction of four complete ocean going tugs for the lump sum price of $232,000.00 each; the dates when the vessels were to be delivered; dates when payment were to be made and such usual provisions as are found in shipbuilding contracts.

Clause 5 of said contract was as follows:

"It is agreed that the title to all vessels, either completed or under construction insofar as they shall have been inspected and approved by the owner shall be in the United States of America. * * * *"

Defendant's Exhibit 7 as read in evidence was No. 457 Sup. and except as to dates and the number of tugs to be constructed was in every respect identical with Exhibit No. 6.

The defendant then called as a witness

WALTER M. SANDERS,

who being duly sworn testified substantially as follows:

That during the years 1918 and 1919 he was assistant to one of the Vice Presidents of the United States Shipping Board Emergency Fleet Corporation; that said Vice President was in charge of cancellations and adjustments; part of the time Charles Piez was such Vice President and at other times J. L. Ackerson; that he knew

there were two contracts entered into in 1918 between Sidney C. McLouth and the Fleet Corporation representing the government, to build nine ocean going wooden tugs. Witness was then shown a telegram marked "Defendant's Exhibit No. 8," dated April 29, 1918, and said he sent such telegram to Mr. McLouth; that the sending of such telegram was the usual method employed in cancelling contracts that had been entered into by the Fleet Corporation, representing the government, for shipbuilding material; he had no definite knowledge as to whether McLouth notified all sub-contractors or persons with whom he made contracts for materials for those tugs, but all contractors were instructed to notify sub-contractors in every case and such instructions were given McLouth in the telegram he sent.

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he stated that Mr. McLouth was not an officer of the Fleet Corporation.

Defendant's Exhibit No. 8, being the telegram identified by such witness was here offered in evidence.

Plaintiff's counsel then and there objected to the admission of said telegram for the reason that the same was immaterial and res nullius and because there was no privity of contract between the plaintiff and the Fleet Corporation, which said objection the court then and there overruled and the said telegram was received in evidence.

To which said ruling and decision of the court plaintiff by its counsel then and there duly excepted.

Said telegram as read in evidence was as follows:

"April 29, 1919.

"Sidney C. McLouth Co.,
Marine City, Michigan.

By direction of the board of trustees you are directed to suspend all work on hulls No. 2418, 2716, 2717, 2718, 2719, 2720, contract 457 and 457 Sup stop order all work stopped on commitments made by you as to these hulls and make no further commitments and expenditures as to them stop permission is hereby given you subject to

our final approval to solicit and accept domestic work for private account for tonnage substantially equivalent to the tonnage covered by this suspension order. Details follow by letter.

William Sanders,
Assistant to Director General in Charge of Cancellation."

The defendant here offered in evidence its Exhibit No. 9, being certified copy of a telegram sent by J. L. Ackerson, identified by Mr. Sanders as being vice president of the Fleet Corporation, dated August 20, 1919, addressed to Sidney McLouth, Marine City, Michigan, suspending the remainder of the hulls contracted for in the two contracts in evidence.

Plaintiff, by its counsel, then and there objected to the introduction of said telegram in evidence for the reason that said telegram was immaterial and res nullius, there being no privity of contract between the plaintiff and the Fleet Corporation, and for the further reason that said telegram was not signed by the Fleet Corporation.

The court overruled plaintiff's said objections and the said telegram was received in evidence, to which ruling and decision of the court in admitting the said telegram as evidence plaintiff by its counsel, duly excepted.

Said telegram as read in evidence was as follows:

"August 20, 1919.

"Sidney McLouth,
Marine City, Michigan.

By direction of the board of trustees you are directed to suspend all work on hulls No. 2415 to 2417 inclusive, contract No. 457 stop order all work stopped on commitments made by you as to these hulls and make no further commitments or expenditures as to them stop will you come to Philadelphia at once and bring list of material and equipment on order for suspended boats. This information is required by cancellation section stop details follow by letter.

J. L. Ackerson,
Vice President."

The defendant then offered in evidence its Exhibit No. 10, purporting to be a certified copy of a letter from the Fleet Corporation to Sidney C. McLouth, dated September 17, 1919.

The plaintiff, by its counsel, then and there objected to the introduction of said letter for the reason that same is immaterial and res nullius, and because there is no privity of contract between the Fleet Corporation and the plaintiff. The court overruled plaintiff's said objection and the said letter was received in evidence.

Plaintiff, by its counsel, then and there excepted to the said ruling and decision of the court in overruling said objection and in receiving said letter in evidence.

Said letter as read in evidence was as follows:

"September 17, 1919.

"Sidney C. McLouth,
Marine City, Michigan.

Gentlemen:

Tugs 2415 to 2417 inclusive were suspended on August 20, 1919, and hull 2418 was suspended on April 29, 1919; hulls 2716 to 2720 inclusive were suspended on April 29, 1919. It has been decided that no further work will be done on these boats; therefore we are issuing definite cancellation order:

By direction of the board of trustees your contracts 457 and 457 Sup. are hereby cancelled as to hulls Nos. 2415 to 2418 inclusive and hulls Nos. 2716 to 2720 inclusive; and you are hereby directed to notify all sub-contractors affected by this cancellation.

This cancellation in no way affects the negotiations which are under way with the cancellation and adjustment section in connection with the adjustment of this contract.

In the suspension notice heretofore sent you, you were directed to make no further commitments in connection with the construction of the above mentioned hulls.

Please acknowledge receipt of this letter.

Yours very truly,
United States Shipping Board
Emergency Fleet Corporation."

The defendant then rested its case.

Plaintiff in rebuttal called as a witness,

I. C. WILSON,

who being first duly sworn testified substantially as follows:

That he was the same I. C. Wilson whose deposition had previously been taken and witness was then shown schedules of lumber which had been exhibited to the witness John J. Manley and Mr. Wilson testified that those schedules and specifications were the original ones submitted to Ingram-Day Lumber Company by John J. Manley, agent for McLouth, prior to entering into the contract of February 5, 1919, between Ingram-Day Lumber Company and McLouth. Said schedules were offered and received in evidence. The witness then testified that at the time the contract of February 5, 1919, between Ingram-Day Lumber Company and McLouth was entered into, neither said company nor any of its officers had any knowledge of McLouth's contract with the government for the construction of tugs; that at the various conferences between Mr. Manley, agent for McLouth, and the officers of the Ingram-Day Lumber Company, at all of which witness was present, Mr. Manley never advised them of the existence of a contract between McLouth and the government; that the first knowledge the Ingram-Day Lumber Company had of the fact that McLouth was building tugs for the government was at a conference with Mr. Manley after the receipt of the telegram of May 6, 1919. When the plaintiff entered into the contract of February 5, 1919, it had no particular interest for whom McLouth was building vessels, for the reason that plaintiff, prior to entering into this contract had investigated McLouth's credit rating and found the same to be satisfactory, his rating being approximately one half million dollars.

On

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witness testified that he knew of several shipyards on the

gulf coast that in February of 1919 were engaged in building vessels for private owners and not for the United States.

Plaintiff rested.

The evidence being closed, counsel for the plaintiff requested the court to make the following special findings of fact and conclusions of law.

REQUEST FOR FINDINGS OF FACT

FIRST

That the plaintiff in this case is a Wisconsin corporation. That the original defendant in this case was a citizen and resident of the State of Michigan. That after this cause was at issue the original defendant, Sidney C. McLouth, died; his death having been suggested to the court, said cause was properly revived against his administrator, The American Loan and Trust Company, a Michigan corporation.

SECOND

That on to-wit: February 5th, 1919, the plaintiff and said McLouth entered into a certain written contract, set forth as Exhibit "A" of plaintiff's declaration. This contract was slightly modified by a subsequent agreement between plaintiff and said McLouth, evidenced by a letter of said McLouth's agent to plaintiff, dated Feb. 28, 1919, being Exhibit "C" of said declaration; plaintiff's letter to said McLouth dated March 3, 1919, being Exhibit "D" of said declaration; and telegram from said McLouth to plaintiff dated March 7, 1919, being Exhibit "E" of plaintiff's declaration; that under the terms of the contract of February 5th, 1919, as so modified, the plaintiff agreed to sell and the said McLouth agreed to buy 1,537,032 feet of especially cut and manufactured lumber at a contract price of $105,806.29.

THIRD

That prior to May 6th, 1919, in accordance with the

said contract between the parties of February 5th, as modified, the plaintiff had prepared and shipped to said McLouth 617,366 feet of lumber, which lumber the said McLouth had accpeted and paid for.

(Depositions page 13).

FOURTH

On May 6, 1919, McLouth directed plaintiff to suspend further shipments and thence forward refused performance of said contract on his part, although plaintiff continued to tender performance of its obligations thereunder.

FIFTH

That when the plaintiff received the said McLouth's telegram of May 6th, 1919, the plaintiff had then completed the manufacture and preparation of 115,000 feet of lumber, except for dressing and loading costs, that it would have cost the plaintiff the sum of $400 to dress and load this 115,000 feet and that the resale value of this 115,000 feet of lumber amounted to the sum of $1,725. Deducting from the contract price the cost of dressing and loading, and the resale value of this particular 115,000 feet from the contract price of same, there is a balance due the plaintiff on this item amounting to the sum of $5,918.10. (Depositions pages 13-14-15).

SIXTH

That after deducting from the original contract the 617,366 feet set forth in the Third finding of fact and the 115,000 feet set forth in the Fifth finding of fact, the balance to be furnished under the contract amounted to 804,696 feet. (Depositions page 13).

SEVENTH

That on May 6th, 1919, the 804,696 feet set forth in the sixth finding of fact was still in the trees, but all original preparations for the manufacture of this lumber, such as railroad facilities, the selection of the trees and

the building of logging roads had been completed by the plaintiff. (Depositions pages 8 and 44-45).

EIGHTH

That it would have cost the plaintiff to complete the manufacture of the 804,696 feet of lumber referred to in the Sixth and Seventh findings of fact the sum of $19,400, which amount is derived from the total of the following items:

For Timber	$10,000.00	
" Logging	4,800.00	
" Milling	2,500.00	
" Dressing	1,300.00	
" Loading	800.00	$19,400.00

(Depositions pages 21 and 46-47-48).

NINTH

That the contract price of the 804,696 feet referred to in the Sixth, Seventh and Eighth findings of fact amounted to the sum of $56,271.86. Deducting from the contract price the cost of manufacturing this lumber as appears from the Eighth finding of fact, I find a balance due to the plaintiff on this item amounting to the sum of $36,871.86.

TENTH

That the plaintiff was at all times able, ready and willing to perform the contract on its part, but said McLouth refused further performance on his part as found in the Fourth finding above.

ELEVENTH

That prior to entering into the contract of February 5th, 1919, the defendant furnished plaintiff certain schedules showing the size and quality of lumber required by the defendant, I find that these schedules nowhere mention that defendant had a contract with the United States government or any agency thereof.

TWELFTH

That the contract of February 5th, 1919, between plaintiff and McLouth and the subsequent modifications thereof, contain no provision whatsoever providing for cancellation thereof.

FOURTEENTH

I further find that the first knowledge plaintiff had that McLouth was engaged in fulfilling a contract with the United States government or any agency thereof, was after the receipt by plaintiff of a telegram from McLouth under date of May 6, 1919.

FIFTEENTH

That the United States government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract of February 5th, 1919, between plaintiff and McLouth.

CONCLUSION OF LAW

FIRST

That the pleas filed on behalf of Sydney C. McLouth and the American Loan & Trust Company, administrator of the estate of Sydney C. McLouth, deceased, were pleas of non assumpsit, no notices of special defense having been attached to the pleas under Rule 44 of this court. All evidence of McLouth's dealings with the United States government, or any agency thereof, is inadmissible and is excluded.

SECOND

There being no privity of contract between plaintiff and the United States government, or any agency thereof, and the United States government never having cancelled, modified, suspended or requisitioned the contract between plaintiff and McLouth, the Act of June 15th, 1917, (40 United States Statutes at Large 182), has no application to the facts in this case.

THIRD

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to a judgment in the sum of $42,789.96, together with interest at 5% from August 5, 1918.

Counsel for plaintiff and counsel for defendant then submitted to the court their briefs on the law.

And afterwards, to-wit, on August 12, 1924, the defendant filed its petition for leave to amend its plea to the granting of which plaintiff formally objected, and on September 17, 1924, said petition was argued and submitted.

And afterwards, to-wit, on June 1, 1925, the court made and filed the following special findings of fact:

(1) That at the time plaintiff's contract was entered into with McLouth, the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

(2) That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred eighty-nine and 96/100 dollars ($42,789.96).

(3) That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven and 65/100 dollars ($647.65), with interest from the date of the suspension of the contract.

And on the same day the court filed in said cause his written opinion and entered judgment in favor of the plaintiff and against the defendant, for the sum of six hundred and forty-seven and 65/100 dollars ($647.65) with interest, to which entry of judgment, and to the failure of the court to find as requested in plaintiff's request for special findings of fact number fifteen, and to the failure of the court to find as requested in plaintiff's conclusions of law numbered one, two and three, the plaintiff duly excepted and was allowed exceptions severally thereto.

And inasmuch as none of said exceptions so taken, as aforesaid, appear of record in this cause, this bill of exceptions is settled and signed by said District Judge on this 3rd day of August, A. D. 1925, on the prayer of said plaintiff, to which day the time was duly extended.

Charles C. Simons,
District Judge.

O. K., Delos G. Smith,
United States Attorney and as
Attorney for Defendant.

O. K., Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

PETITION FOR WRIT OF ERROR

(Filed July 13, 1925).

And now comes Ingram-Day Lumber Company, plaintiff herein, and says that on or about the first day of June, A. D. 1925, this court entered judgment herein in favor of this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly

authenticated, may be sent to the said Circuit Court of Appeals.

W. A. White,
Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS

(Filed July 13, 1925).

Now comes the plaintiff, the Ingram-Day Lumber Company, and says that in the proceedings, record and judgment in said cause, there is manifest error and for assignment thereof says:

First: The court erred in permitting the witness, John J. Manley, to answer the following question:

"State whether or not you had a discussion with them in which they were informed as to the purposes for which the lumber that was being contracted for, was desired by Mr. McLouth?"

Second: The court erred in permitting the witness, John J. Manley, to answer the following question:

"State whether or not the specifications by the Fleet Corporation of the dimensions and character of the ships and its materials were present and used in estimating the price of the contract—the price of the lumber to be sold?"

Third: The court erred in permitting the witness, John J. Manley, to answer the following question:

"State whether or not at that time, or at any time in visiting them, you carried to them a copy of the con-

tracts under which McLouth was building these tugs?"

Fourth: The court erred in receiving in evidence Defendant's Exhibit 6.

Fifth: The court erred in receiving in evidence Defendant's Exhibit 7.

Sixth: The court erred in receiving in evidence Defendant's Exhibit 8.

Seventh: The court erred in receiving in evidence Defendant's Exhibit 9.

Eighth: The court erred in receiving in evidence Defendant's Exhibit 10.

Ninth: The court, having found as a matter of fact that plaintiff's lost profits amounted to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents, ($42,789.96) erred in finding as a matter of law that plaintiff's lost profits did not constitute a proper element of damage.

Tenth: The court, having found as a matter of fact that plaintiff's lost profits amounted to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents ($42,789.96), erred in rendering judgment for the plaintiff in the sum of six hundred forty-seven dollars and sixty-five cents ($647.65).

Eleventh: The court, having found as a fact that at the time plaintiff entered into its contract with McLouth it had no knowledge of McLouth's contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation, erred in holding as a matter of law that the cancellation by the Fleet Corporation of McLouth's contracts with it permitted McLouth in turn to cancel his contract with the plaintiff.

Twelfth: The court erred in permitting the defendant to file an amended plea.

Thirteenth: The court erred in failing to find as a matter of fact that the United States government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract of February 5th, 1919, between plaintiff and McLouth.

Fourteenth: The court erred in failing to find as a matter of law and fact that there was no privity of contract between plaintiff and the United States govern-

ment, or any agency thereof.

Fifteenth: The court erred in finding as a matter of law that the Act of Congress, known as Urgency Deficiencies Appropriation Act of June 15th, 1917 (40 United States Statutes at Large 182) authorized the President, through his properly delegated agents, to cancel the plaintiff's contract with McLouth.

Wherefore, the plaintiff prays that the judgment of said District Court may be reversed and said cause remanded to said District Court with instructions to enter a judgment for the plaintiff in the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents ($42,789.96), together with interest at five per cent (5%) from August 5th, 1918.

W. A. White.
Miller, Canfield, Paddock & Stone.

ORDER ALLOWING WRIT OF ERROR

(Entered July 13, 1925).

This 13th day of July, A. D. 1925, came the plaintiff by its attorneys, and filed herein and presented to the court its petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying, also, that a transcript of the record, proceedings and papers in this cause upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the sixth judicial circuit, and that such other and further proceedings may be had as may be proper in the

premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of two hundred and fifty dollars ($250.00).

Charles C. Simons,
U. S. District Judge.

BOND ON WRIT OF ERROR

(Filed July 13, 1925).

Know all men by these presents that we, Ingram-Day Lumber Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the clerk of the District Court of the United States for the Eastern District of Michigan, or his successors in office, in the full and just sum of two hundred fifty dollars ($250.00) to be paid to the said clerk, his certain attorneys or successors in office, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-five.

Whereas, lately at a session of the District Court of the United States for the Eastern District of Michigan, Southern Division, in a suit depending in said court, between Ingram-Day Lumber Company, plaintiff, and American Loan & Trust Company, administrator, defendant, a judgment was rendered against the said American Loan & Trust Company, administrator, and the said

Ingram-Day Lumber Company having sued out a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment in the aforesaid suit;

Now, the condition of the above obligation is such, that if the said Ingram-Day Lumber Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

(Corp. Seal) Ingram-Day Lumber Company,
Per A. S. Mitchell, Secy. and Gen. Mgr.

Sealed and delivered in presence of:
Miss Eva Davidoff.
W. H. Baria.

American Surety Company of New York.
By Frederick L. Fraser,
Resident Vice-President.
Attest: Geo. I. Cloutier,
Resident Assistant Secretary.
(Corp. Seal)

WRIT OF ERROR

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America, Sixth Judicial Circuit, ss.
The President of the United States.
To the Honorable, the Judge of the District Court

of the United States for the Eastern District of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between Ingram-Day Lumber Company, plaintiff, and Sydney C. McLouth, revived against The American Loan & Trust Company, administrator defendant, a manifest error hath happened, to the great damage of the said Ingram-Day Lumber Company, plaintiff, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnai, in said Circuit, on the 12th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 13th day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and fiftieth.

Elmer W. Voorheis,
Clerk of the District Court of the United States
for the Eastern District of Michigan.
(Seal of the Court)

PRAECIPE FOR TRANSCRIPT OF RECORD

(Filed July 13, 1925).

To the clerk of said court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Sixth Judicial Circuit, under the writ of error heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Declaration.

Plea of defendant, Sydney C. McLouth.

Stipulation waiving jury.

Suggestion of death of defendant.

Appearance of American Loan & Trust Company, administrator.

Plea of American Loan & Trust Company, administrator.

Stipulation waiving jury.

Plaintiff's requests for findings of facts and conclusions of law.

Defendant's petition for leave to amend plea.

Defendant's amended plea.

Opinion of the court with findings of fact.

Order on opinion awarding plaintiff judgment.

Judgment.

Order extending time for settlement of bill of exceptions.

Bill of exceptions.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error and fixing amount of bond.

Bond on writ of error.

Clerk's certificate to transcript of record.

Writ of error.

Praecipe for transcript of record.

Acknowledgment of service of praecipe.

Citation, with proof of service.

Said transcript to be prepared as required by law

and the rules of the United States Circuit Court of Appeals for the Sixth Circuit.

W. A. White,
Miller, Canfield, Paddock & Stone,
Attorneys for Plaintiff.

ACKNOWLEDGMENT OF SERVICE OF PRAECIPE

(Filed July 14, 1925).

Service upon the defendant in the above entitled cause of a copy of the plaintiff's praecipe for record, together with a copy of plaintiff's proposed bill of exceptions and notice that the same would be brought on to be heard on Monday, the 27th day of July, A. D. 1925, at the opening of court, or as soon thereafter as counsel may be heard, is hereby acknowledged.

American Loan & Trust Company.
Per J. C. Shaw,
Vice President.

Dated: July 14, 1925.

CITATION

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America, Sixth Judicial Circuit, ss.

To Sidney C. McLouth, revived against the American Loan & Trust Company, administrator of the estate of Sydney C. McLouth, deceased.

Greeting: You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 12th day of August next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Michigan, wherein Ingram-Day Lumber Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said defendant-in-error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 13th day of July, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and fiftieth.

Arthur J. Tuttle,
United States District Judge.

Due and timely service of the within citation is hereby accepted.

American Trust Co.,
Formerly American Loan & Trust Co.,
By J. C. Shaw,
Admr. Sydney C. McLouth Estate.
Delos G. Smith,
U. S. District Attorney and
Attorney for Defendant-in-Error.
By Wallace Visscher,
Asst. U. S. Attorney.

ORDER EXTENDING TIME TO MAKE RETURN TO WRIT OF ERROR

(Entered August 12th, 1925).

Upon the application of the clerk of this court, for cause shown, it is by the court now here ordered that the time in which to file and docket printed record on writ of error in this cause, be and the same is hereby extended to and including the 12th day of September, A. D. 1925.

Arthur J. Tuttle,
United States District Judge.

ORDER EXTENDING TIME TO MAKE RETURN TO WRIT OF ERROR

(Entered September 12th, 1925).

Upon the application of the clerk of this court, for cause shown, it is by the court now here ordered that the time in which to file and docket printed record on writ of error in this cause, be and the same is hereby extended to and including the 12th day of October, A. D. 1925.

Arthur J. Tuttle,
United States District Judge.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed October 13, 1925)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as counsel for the Plaintiff in Error.

MILLER, CANFIELD, PADDOCK & STONE,
Penobscot Bldg., Detroit, Michigan.
W. A. WHITE,
Gulfport, Mississippi.

CAUSE ARGUED AND SUBMITTED

(March 12, 1926—Before DENISON, DONAHUE AND MOORMAN, J.J.)

This cause is argued by Mr. William J. Shaw and Mr. Ferris D. Stone for the Plaintiff in Error and by Mr. Charles A. Meyer, Assistant United States Attorney and Mr. I. V. McPherson, Special Assistant to the Attorney General for the Defendant in Error and is submitted to the Court.

JUDGMENT

(Filed June 30, 1926)

Error to the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed with costs.

OPINION

(Filed June 30, 1926)

Before DENISON, DONAHUE and MOORMAN, Circuit Judges.

The plaintiff in error brought an action against McLouth to recover damages for breach of a contract by the terms of which the plaintiff agreed to manufacture and sell, and McLouth agreed to buy, at a specified price, approximately 1,500,000 ft. of lumber of different sizes and kinds. In pursuance of this contract the plaintiff manufactured and shipped to McLouth about 600,000 ft. of lumber for which McLouth paid the contract price. McLouth then cancelled the contract and refused to accept further shipments. No other lumber was manufactured or shipped and no further expense incurred by the Ingram-Day Company, after notice of cancellation.

It appears from the exhibits attached to the petition that this lumber was purchased and furnished for the completion of four tugs and that the price named in the original order was increased by reason of the fact that the American Bureau of Shipping required longer scarfs for sides, bilge and floor ceilings of the tugs than specified in the original order. The defendant filed a plea of the general issue without notice of any special defense. Before the trial of the cause McLouth died and the action was revived in the name of American Loan & Trust Company, who was appointed administrator of his estate. A written waiver of jury was filed and pending the trial by the court without the intervention of a jury and before judgment the defendant was given leave to file an amended plea in which in addition to the general denial it was further alleged in substance that in August and September of 1918, the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the United States entered into two contracts with McLouth to construct for the United States Government nine wooden ocean going tugs at the price of $232,000.00 each. On February 5, 1919, McLouth entered into the contract in suit

with the Ingram-Day Lumber Company to manufacture and furnish the lumber to be used in the construction of four of these tugs. On April 29, 1919, the Fleet Corporation acting for and on behalf of the United States ordered and directed McLouth to suspend all work on hulls Nos. 2418, 2716 to 2720, inclusive, and to order all work stopped on commitments made by him as to these hulls, and make no further commitments and expenditures as to them. Permission was given to McLouth, subject to the final approval of the Fleet Corporation to solicit and accept domestic work for private account for tonnage, substantially equivalent to the tonnage covered by this suspension order, but it does not appear that McLouth obtained or could have obtained any private contract for any tonnage of like character. Defendant further alleged that on August 20, 1919, the Fleet Corporation further ordered McLouth to suspend all work on hulls Nos. 2415 to 2417, inclusive, and to order all work stopped on commitments made by him as to these hulls, and make no further commitments or expenditures as to them; that on May 6, 1919, McLouth notified the plaintiff his contract with the government had been cancelled; that by reason of the cancellation of these contracts by the Fleet Corporation under authority of the Shipping Fund Provision of the Urgency Deficiency Appropriation Act of June 15, 1917, and the executive order issued by the president of the United States on July 11, 1917, and December 3, 1918, McLouth without his fault was prevented from further performance of this contract; that under the terms of the Act above referred to the Ingram-Day Lumber Company is not entitled to recover damages, but only just compensation for whatever cost and expense it had actually incurred in reference thereto prior to notice of cancellation.

It further appears from the evidence that pending unsuccessful efforts by McLouth to induce the Fleet Corporation to reinstate these contracts, the plaintiff suspended work in the manufacturing and preparation of this lumber and made no further shipments to McLouth, but at the time it received the notice of suspension it had expended $2,372.65 in the partial manufac-

ture of 115,000 ft. of lumber of sizes and dimensions for which there was no general market, and after the final cancellation of the contract by the Fleet Corporation, September 18, 1919, plaintiff remanufactured this lumber and sold it at a loss of $647.65. The trial court entered a judgment in favor of the plaintiff in the sum of $647.65 with interest from the date of suspension of the contract with costs, and upon request of the plaintiff made the following finding of facts:

"(1) That at the time plaintiff's contract was entered into with McLouth, the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being biult for the Fleet Corporation.

"(2) That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.

"(3) That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract."

DONAHUE, Circuit Judge: It is claimed on the part of the plaintiff in error that the court erred to its prejudice in permitting the defendant to file its amended plea and in admitting evidence in reference to McLouth's contracts with the government, and their subsequent cancellation. A court has discretion to permit amendment to pleadings upon such conditions, as it shall, in its discretion and by its rules prescribe, Section 954, R. S. (Section 1591, Compiled Statute), *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76; *Mathison Alkali Works v. Mathison*, 150 Fed. 241 (Certiorari denied, 204 U. S. 674). The court did not abuse its discretion in permitting this amended plea to be filed and receiving this evidence, regardless of whether the amended plea was filed prior to the introduction of the evidence or after the introduction of the evidence to conform thereto.

The substantial question involved in this case is whether under the provision of the Act of June 15, 1917, and the "Emergency Shipping Fund" provision of the Urgency Deficiency Appropriation Act of October 6, 1917, and subsequent amendments and acts in reference thereto, the plaintiff's contract with McLouth is affected by the cancellation of McLouth's contract with the government. This Act authorized the president to exercise the power vested in him and expend the funds thereby and thereafter to be appropriated, through such agency or agencies as he from time to time determined. In pursuance of this authority the president by the executive orders of July 11, 1917, and December 3, 1918, directed that this power should be exercised by and through the United States Shipping Board Emergency Fleet Corporation. The Fleet Corporation therefore had the power to make this contract with McLouth and to suspend and cancel the same, upon making just compensation.

It is clear from this provision that it was not the intent or purpose of Congress that just compensation should be based upon loss of profits that might be earned in the completion of the contract. *Dusenbury Motor Corp.* v. *U. S.*, 260 U. S. 115.

The plaintiff relies largely upon the decision in the case of the *American Chain Co.* v. *Interstate Iron & Steel Co.*, 291 Fed. 1006, but the facts of that case are wholly different from the facts involved in this litigation. In that case the Chain Company had purchased from the Steel Company 4,800 tons of round iron bars from one to three inches in diameter of "standard sizes, shapes and sections, as are within sellers' regular range of practice." The Chain Company at that time had a contract with the Fleet Corporation to furnish 140 anchor chains, 2½ inches in diameter and of the total 4,800 tons less than 150 tons would be suitable for the manufacture of these anchor chains and none were manufactured for the specific purposes, but were sold from the regular stock in trade of the Steel Company.

In that case the court specifically found that the seller was not a sub-contractor, but an independent seller of its standard product which it was offering generally in

the market. While there may be some things said in that opinion tending to support the claim of the plaintiff, nevertheless, the language used must be construed in connection with the facts of that case.

In the case at bar the plaintiff agreed to manufacture lumber of specified sizes and kinds as required by the American Bureau of Shipping to be used in the construction of these tug boats, which sizes were not standard and could not be sold upon the general market, but were of quality and size suitable for that particular purpose and none other. From this it appears that the plaintiff was a sub-contractor who had undertaken to manufacture and supply the specific materials necessary for the construction of the tugs which McLouth had contracted to construct for the Fleet Corporation.

In *Todd Dry Dock & Construction Corporation* v. *Iron Works*, 289 Fed. 217, it was held that the provision of the Act of June 5, 1917, authorizing the Fleet Corporation to modify, suspend or cancel any existing contract is without limitation and applies to contracts made by the government or its agents for ships and material and extends not only to the principal contracts, but to all sub-contracts for material and labor, the performance of which would impose further obligation on the government, and that this provision of the act was read into every contract, and was notice to and binding on all contractors and sub-contractors, and precludes recovery of anticipated profits from any contract or sub-contracts so cancelled. That case and *American Chain Co.* v. *Interstate Iron & Steel Co.*, *supra*, were both pending in the Supreme Court at the same time, upon petitions for writs of Certiorari which petitions were denied on October 8 and October 22, 1923, respectively. (263 U. S. 700, 709.)

This, we think, is the correct construction of these acts. They were passed to meet the exigencies of war, and because of the impossibility of knowing when the war would end, Congress wisely provided for the cancellation of these contracts to prevent the needless expenditures of public funds, and the waste of material in the construction of ships and tugs no longer needed by the government for war purposes or for any

other purpose. Just compensation would necessarily include and damages the principal contractor would be compelled to pay upon any contracts or commitments for material or labor. If sub-contractors are entitled to damages for breach of contract based upon the profits they would earn if these contracts were completed, the benefits of the provision of this Act, in reference to just compensation, would be substantially, if not wholly, lost to the government. The facts of this case are substantially identical with the facts involved in *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works, supra*. In that case the Supreme Court denied cretiorari. For this reason the decision in that case is especially persuasive.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, ARTHUR B. MUSSMAN, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Ingram-Day Lumber Company v. Sydney C. McLouth, et al., No. 4487, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 24th day of July, A. D. 1926.

ARTHUR B. MUSSMAN,
[SEAL] Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 23, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4161)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1926

No.

INGRAM-DAY LUMBER COMPANY,
Petitioner,

vs.

SYDNEY C. McLOUTH,
Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Ingram-Day Lumber Company, a Wisconsin Corporation, respectfully represents:

February 5, 1919, or nearly three months after the signing of the Armistice, Sydney C. McLouth, of Marine City, Michigan, contracted in writing with petitioner for the manufacture and delivery to him of specified quantities of lumber (R. 5-10); petitioner did not make said contract as a sub-contractor under any other con-

tracts of McLouth or otherwise than as a direct, original contractor with him, on his own credit (R. 56), according to the terms of said instrument; and it had no notice or knowledge whatsoever of McLouth's contract with the United States Shipping Board Emergency Fleet Corporation (R. 56).

May 6, 1919, McLouth breached his said contract with petitioner (R. 47) to its damage in the sum of $42,789.96 (R. 61).

Petitioner sued McLouth in the District Court of the United States for the Eastern District of Michigan in an action of assumpsit for said breach (R. 1-14) and the United States Attorney for said District appeared in his behalf and pleaded the general issue (R. 14). Subsequently McLouth died; the cause was revived against his Administrator, who appeared by the Assistant United States Attorney and pleaded the general issue (R. 22).

The issue was tried to the court without a jury (R. 23), and the defense, over petitioner's objections, introduced in evidence two contracts for the construction of tugs between McLouth and said Fleet Corporation (R. 51-52) and a cancellation thereof by said Fleet Corporation (R. 53-55). The defense of McLouth was that the cancellation of his contracts with the Fleet Corporation, under the Act of June 15, 1917 (40 Stat. 182) limited his liability to petitioner to the value of the lumber actually delivered to him and absolved him from further liability for said breach.

The District Court made findings of fact and conclusions of law (R. 61) and entered judgment for petitioner in the sum of $647.65 (R. 39). The District Court found as a fact that petitioner had no knowledge

of McLouth's contracts with the Fleet Corporation; it also found as a fact that its total damage on account of said breach of contract by McLouth was $42,789.96, of which sum $42,142.31 represented its lost profits (R. 61). The District Court, nevertheless, declined to enter judgment for petitioner for more than said sum of $647.65 (R. 39) on account of the decision of the United States Circuit Court of Appeals for the Ninth Circuit in Todd Dry Dock and Construction Company vs. Sumner Iron Works, 289 Fed. 217 (Certiorari denied, 263 U. S. 700) (R. 38-39).

Upon writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, that Court affirmed the judgment of the District Court on the ground that petitioner was a sub-contractor under McLouth and chargeable with notice of all the conditions of his contracts with the Fleet Corporation (R. 74-79).

Petitioner is advised and believes that the judgment of the said Circuit Court of Appeals in said case is erroneous and contrary to the just rights of petitioner and that this Court should require said cause to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

The judgment of the Circuit Court of Appeals in said case rests upon its assumption that petitioner had knowledge of McLouth's contracts with the Fleet Corporation, was a sub-contractor under them, and was bound by all their terms (R. 74-79). The judgment of the District Court was based on its conclusion that such knowledge, or lack of knowledge, was immaterial, under the decision of the Court of Appeals for the Ninth Circuit in Todd Dry Dock & Construction Company vs. Sumner Iron Works (supra) (R. 38-39).

The District Court found as a fact that petitioner had no knowledge of McLouth's contracts with the Fleet Corporation (R. 61). No exception was taken to this finding and it was not questioned in the Circuit Court of Appeals. There was nothing in the record therein to show that petitioner was a sub-contractor under McLouth or was in any privity whatsoever with the Fleet Corporation or its contracts with him aforesaid. The Court of Appeals erred in both said assumptions of fact, to-wit, that petitioner had knowledge of said contracts and that it was a sub-contractor under McLouth, and its said judgment is erroneous unless, as a matter of law, the statute includes such contracts as that between petitioner and McLouth in this case.

This petition presents these questions:

1. Can subdivision (b) of the Act of June 15, 1917, 40 Stat. 182, authorizing and empowering the President "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material" be used to modify the obligations of a private contract, by one of the parties thereto as against the other without the latter's consent?

2. Does the cancellation of a contract between an individual and the Government under said subdivision (b) relieve that individual from the obligations of his private contract with another individual who contracted with him without knowledge of his contract with the Government?

3. Does subdivision (b) authorize the modification or cancellation of a private contract, as between the parties without their assent thereto?

4. Petitioner having no knowledge of McLouth's contracts with United States Shipping

Board Emergency Fleet Corporation, did the cancellation by the Fleet Corporation of McLouth's contracts with it entitle McLouth to, in turn, cancel his contract with petitioner?

Certiorari should be granted in the case for the following reasons:

I.

Conflict of decisions exists between the Circuit Court of Appeals, Sixth Circuit, which rendered the decision in this case, and the Circuit Court of Appeals, Seventh Circuit, which decided the case of American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, Certiorari denied, 263 U. S. 709.

II.

The decision of the Court of Appeals is in conflict with settled principles of law.

III.

The precise question involved—does the Act of June 15, 1917, 40 United States Statutes at Large 182, give to one party the right to modify the obligations of a private contract entered into with another without its consent?—has never been decided by this Court, but public interest requires that it should be.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case which was entitled in that Court "Ingram Day Lumber Company, Plaintiff

in Error, vs. Sydney C. McLouth, Revived against The American Loan & Trust Company, Administrator of the Estate of Sydney C. McLouth, Deceased, Defendant in Error, No. 4487," to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate; and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

INGRAM DAY LUMBER COMPANY,
By W. A. WHITE,
SIDNEY T. MILLER,
GEORGE L. CANFIELD,
FERRIS D. STONE,
WILLIAM J. SHAW,
Attorneys for Petitioner.

STATE OF MICHIGAN, }
COUNTY OF WAYNE. }ss.

George L. Canfield, being duly sworn, says: I am a member of the firm of Miller, Canfield, Paddock & Stone, attorneys for petitioner herein.

I have read the foregoing petition, and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is absent from the State of Michigan and none of its officers are available for that purpose.

This application is made in good faith and not for the purpose of delay.

.....

Subscribed and sworn to before me this ..... day of September, A. D. 1926.

.....

Notary Public, Wayne County, Mich.

My commission expires.....

I do hereby certify that I have examined the foregoing petition and that in my opinion it is well-founded and entitled to the favorable consideration of this court.

.....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No.

INGRAM DAY LUMBER COMPANY,
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Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,
Respondent.

PETITIONER'S SUPPORTING BRIEF.

W. A. WHITE,
SIDNEY T. MILLER,
GEORGE L. CANFIELD,
FERRIS D. STONE,
WILLIAM J. SHAW,
Attorneys for Petitioner.

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PETITIONER'S SUPPORTING BRIEF.

Official reports of opinions delivered in court below.

District Court Opinion, 6 Fed. (2d) 471.

Circuit Court of Appeals. Not yet reported.

See Record, pp. 74-79.

STATEMENT OF JURISDICTION OF SUPREME COURT.

(1) This is an action of assumpsit commenced by the Ingram-Day Lumber Company, a Wisconsin corporation, in the District Court of the United States for the Eastern District of Michigan, Southern Division, against Sydney C. McLouth, a citizen and resident of Marine City, Michigan, for the recovery of damages for breach of contract in an amount not exceeding one hundred thousand dollars. (R. 1-4.) Judgment was entered in the District Court June 1, 1925 (R. 39). On writ of error this judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on June 30, 1926 (R. 73).

(2) It was contended by petitioner in the District Court and in the Court of Appeals (R. 63-65):

(a) That the admission in evidence, both oral and documentary, of McLouth's transactions with the Fleet Corporation, was erroneous.

(b) That the District Court having found as a fact that petitioner had been damaged by McLouth's breach of contract in the amount of $42,789.96, erred in rendering judgment for petitioner for the sum of $647.65.

(c) That the Court erred in permitting McLouth to file an amended plea.

(d) That the Court erred in holding that the cancellation by the Fleet Corporation of its contracts with McLouth, permitted McLouth to in turn cancel his contract with petitioner.

(e) That the Court erred in failing to find as a matter of fact that the United States Government,

or any agency thereof, never modified, suspended, cancelled or requisitioned the contract between petitioner and McLouth.

(f) That the Court erred in holding that the Act of June 15, 1917, applied to this contract.

(3) Certiorari is prayed under Section 240 of the Judicial Code as amended by Act of February 13, 1925.

U. S. Comp. Stat., Cum. Supp. 1925, *Chap.* 10, *Par.* 1217.

It is submitted that this record presents special and important reasons for reviewing the decision of the Circuit Court of Appeals by the writ of certiorari which the petitioner seeks. Whether the Act of June 15, 1917, can be used by one individual to limit his liability under his private contract with another individual, is an important question of federal law which has not been, but should be, settled by this court. The decision whose review is sought seems in conflict with applicable decisions of this court and with underlying ideas of the rights of parties to private contracts. It is in conflict with the decision of the Court of Appeals for the Seventh Circuit in a suit involving the same statute (Am. Chain Co. vs. Interstate, etc., Co., 291 F. 1006; 263 U. S. 709); and, in its disregard of the finding of fact in the court below, as well as by its approval of the amendment of the plea after the case had been argued and submitted, it apparently departed far enough from the usual course of judicial proceedings to call for an exercise of this court's power of supervision.

STATEMENT OF CASE.

Petitioner is a Wisconsin corporation having its principal place of business at Lyman, Mississippi (R. 35).

Nearly three months after the signing of the Armistice, on February 5, 1919, Sydney C. McLouth of Marine City, Michigan, entered into a written contract with petitioner wherein it was agreed that petitioner would sell and McLouth would buy a large quantity of lumber at a certain stipulated price per one thousand feet (R. 5-10).

In August and September of 1918, McLouth had entered into two contracts with the United States Shipping Board Emergency Fleet Corporation (R. 51-52) under the terms of which McLouth was to build certain tugs for the Fleet Corporation.

When entering into his contract with petitioner, McLouth gave petitioner no information whatever about his contracts with the Fleet Corporation (R. 56); but made an absolute, unqualified, private contract to buy certain lumber.

April 29, 1919, the Fleet Corporation partially cancelled its contracts with McLouth (R. 53); and seizing upon this action by the Fleet Corporation as excusing him from further performance, McLouth proceeded to cancel his contract with petitioner (R. 47).

Suit was brought by petitioner against McLouth in the District Court of the United States for the Eastern District of Michigan, to recover its damages caused by McLouth's breach of his contract (R. 1-14).

McLouth appeared by the United States District Attorney and pleaded the general issue (R. 14-15). Subsequently, McLouth died; the cause was revived against his administrator who appeared by the Assistant United States District Attorney and pleaded the general issue (R. 21-22). A jury having been waived (R. 23) trial was had before the court.

Over the objections of petitioner, McLouth was permitted to introduce in evidence his two contracts with the Fleet Corporation and their subsequent cancellation (R. 51-55). At the conclusion of the trial, petitioner submitted to the Court requests for special findings of fact and conclusions of law (R. 57-61).

The District Court found as a fact that at the time petitioner made its contract with McLouth, it did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation. The Court further found that petitioner's total damages amounted to the sum of $42,789.96, of which amount $42,142.31 represented its lost profits (R. 61).

The District Court was of the opinion that petitioner's lack of knowledge of McLouth's contracts with the Fleet Corporation was immaterial (R. 38-39), and, further, that the case of Todd Dry Dock & Construction Corporation vs. Sumner Iron Works, 289 Fed. 217 (certiorari denied 263 U. S. 709), was controlling of the instant case (R. 39), and accordingly entered judgment for petitioner in the sum of $647.65 (R. 39-40).

On writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, that Court affirmed the judgment of the District Court (R. 73).

In its opinion the Circuit Court of Appeals disregarded the findings of fact of the District Court and held that petitioner was a sub-contractor (R. 78). It further held that this case was substantially identical with Todd Dry Dock & Construction Corporation vs. Sumner Iron Works (supra), and was controlled by that case (R. 79).

SPECIFICATION OF ERRORS RELIED ON.

First. Said Circuit Court of Appeals erred in affirming the judgment of the District Court.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the District Court, and in not remanding said cause to said District Court with instructions to enter judgment for petitioner in the sum of $42,789.96.

Third. Said Circuit Court of Appeals erred in affirming the rulings of the District Court permitting the introduction in evidence of McLouth's transactions with the Fleet Corporation.

Fourth. Said Circuit Court of Appeals erred in holding that petitioner was not entitled to judgment for its damages amounting to $42,789.96.

Fifth. Said Circuit Court of Appeals erred in limiting petitioner's recovery to the sum of $647.65.

Sixth. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, conferred the power to modify the obligations of a private contract.

Seventh. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, applied to this case.

Eighth. Said Circuit Court of Appeals erred in holding that petitioner was a sub-contractor.

Ninth. Said Circuit Court of Appeals erred in holding that the law permitted no recovery of lost profits.

Tenth. Said Circuit Court of Appeals erred in holding that the cancellation by the Fleet Corporation of its contracts with McLouth conferred upon McLouth the power to cancel his contract with petitioner.

SUMMARY.

It is the contention of petitioner that the Act of June 15, 1917 (40 Stat. 182) has no application to the facts in this case for the following reasons:

First. The contract sued upon was between an individual and a private corporation (R. 5-10).

Second. The contract was entered into nearly three months after the war was over (R. 5).

Third. The contract was an absolute, unqualified and independent contract between petitioner and McLouth under the terms of which petitioner agreed to sell and McLouth to buy a certain quantity of lumber (R. 5-10).

Fourth. No mention is made in the contract about any other contract or contracts that McLouth then had or might afterwards enter into with anyone (R. 5-10).

Fifth. No contingencies were incorporated in

the contract to excuse either party from complete performance thereof (R. 5-10).

Sixth. Petitioner did not even know that McLouth had a contract with the Fleet Corporation or that the tugs were being built for the Fleet Corporation (R. 61).

Seventh. If McLouth desired to predicate his liability upon future action of the Fleet Corporation, it was his duty to so contract with petitioner.

Guerini Stone Co. vs. Carlin, 240 *U. S.* 264.

American Chain Co. vs. Interstate Iron & Steel Co., 291 *Fed.* 1006 (Certiorari denied 263 U. S. 709).

Eighth. Not having so contracted, it was error for the Court to receive evidence of McLouth's transactions with the Fleet Corporation.

Guerini Stone Co. vs. Carlin, 240 *U. S.* 264, 278.

Ninth. It is not to be assumed that Congress intended that the power given by the Act of June 15, 1917, should be exercised by the President arbitrarily or that the President, by his order, intended to vest absolute powers in the Shipping Board and Fleet Corporation, subject only to such regulations as he might from time to time prescribe.

The Lake Monroe, 250 *U. S.* 246.

BRIEF OF ARGUMENT.

I.

The admission in evidence, both oral and documentary, of McLouth's transactions with the Fleet Corporation, was clearly erroneous.

The Court will observe the following with reference to the contract sued upon in this case (R. 5-10).

(a) Entered into February 5, 1919, or nearly three months after the signing of the Armistice;

(b) The only parties to the contract were petitioner and Sydney C. McLouth;

(c) The contract was an absolute, unqualified agreement by petitioner to sell and McLouth to buy;

(d) The parties did not contract with reference to any other contract that McLouth then had or might thereafter enter into.

When the case came on for trial, the only parties to the case were petitioner and McLouth's Administrator, who appeared by the Assistant United States Attorney (R. 21). The only plea filed by defendant was a plea of the general issue (R. 22).

From the foregoing it is obvious that McLouth's contracts with the Fleet Corporation and their subsequent cancellation, were entirely immaterial and were clearly inadmissible in evidence.

Guerini Stone Co. vs. Carlin, 240 *U. S.* 264.

Even if otherwise competent, under a plea of the general issue only, such evidence was inadmissible.

Morse vs. Tillotson & Wolcott Co., 253 *Fed.* 340.

Larsen vs. Field, 219 *Mich.* 440.
Werry vs. Granger, 219 *Mich.* 503.

The case was tried May 8, 1924 (R. 40); August 12, 1924, McLouth moved to file an amended plea (R. 29), to which petitioner objected (R. 61), judgment was entered June 1, 1925 (R. 39), and the same day the court permitted McLouth to file his amended plea (R. 36). The Circuit Court of Appeals, in approving this procedure, says:

> "A court has discretion to permit amendment to pleadings upon such conditions, as it shall, in its discretion *and by its rules prescribe*" (R. 76).

There is no rule of the District Court permitting the procedure followed in this case. The District Judge in his opinion (R. 36) mentions no rule but places it upon the ground of sound judicial discretion.

In Stephen on Pleadings (Tyler), at page 151, the author says:

> "But, whatever may be the origin and reason of the method of coming to issue, it is at least certain that that method has been substantially practiced in the English pleading from the earliest period to which any of the now existing sources of information refer. * * * The term itself, of 'issue,' though perhaps somewhat less ancient, yet occurs as early as the commencement of the Year Books, * * * and from the same period at least, if not an earlier one, the production of the issue has been not only the constant effect, but the professed aim and object of pleading."

In 21 Ruling Case Law, page 436, appears the following:

> "In a more restricted and in the commonly accepted sense the object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and so it is that the allegation of such facts must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts."

If the practice followed in this case is proper, we are at a loss to understand why any pleadings should be required in any law suit.

II.

The judgment entered in this case has no support in fact or in law.

The evidence offered by petitioner in this case (R. 47-50) conclusively shows that if McLouth had not breached his contract with petitioner, petitioner would have made a profit amounting to $42,789.96. This fact is not contradicted by McLouth, in fact, it is not even questioned, McLouth offering no testimony concerning the damages suffered by petitioner on account of his breach. The District Court filed a special finding of fact that petitioner's total damages amounted to the sum of $42,789.96, of which amount $42,142.31 represented petitioner's lost profits (R. 61). Nevertheless, the District Court held that lost profits were not a proper element of damage and gave judgment for petitioner in the sum of $647.65. The amount of petitioner's damages was arrived at by deducting from the contract price the cost of performance (R. 48-50).

This Court has many times held that the proper

measure of damages is arrived at by deducting from the contract price the cost of performance.

> "No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work."
>
> *Guernsey Stone Co. vs. Carlin*, 240 U. S. at page 280.

In United States vs. Purcell Envelope Co., 249 U. S. at page 320, appears the following:

> "The Court of Claims decided that the measure of damages was the difference between the cost to the Envelope Company of materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract and what it would have made if it had been allowed to perform the contract. For this the court cited and relied upon Roehm vs. Horst, 178 U. S. 1. It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not arrived, and that liability for the breach at once occurs. And it is further decided that the measure of damages is the difference between the contract price and the cost of performance. The case was replete in its review of prior cases. We may refer, however, to United States vs. Speed, 8 Wall. 77, 85; United States vs. Behan, 110 U. S. 338; Hinckley vs. Pittsburg Steel Co., 121 U. S. 264."

We deem it unnecessary to call the Court's attention

to the numerous other decisions, both State and Federal, which are all to the same effect.

III.

The Act of Congress, June 15, 1917 (40 Stat. 182), cannot be used by one individual to modify the obligations of his private contract with another.

The relevant parts of this Act are set forth in the margin hereof (1).

The following cases, we believe, are all of the reported cases in which this Act, or some portions of it, has been before this Court for construction:

The Lake Monroe, 250 *U. S.* 246.
Hamilton vs. Kentucky Distilleries Co., 251 *U. S.* 146.
United States vs. Strang, 254 *U. S.* 49.
Krichman vs. United States, 256 *U. S.* 363.
United States vs. Pfitsch, 256 *U. S.* 547.
Sloan Shipyards vs. U. S. Fleet Corporation, 258 *U. S.* 549.

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(1) "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and their equipment necessary to operation.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

Omnia Commercial Co. vs. United States, 261 *U. S.* 502.

Russell Motor Car Co. vs. United States, 261 *U. S.* 514.

Emergency Fleet Corporation vs. Sullivan, 261 *U. S.* 146.

Ex parte Skinner & Eddy Corp., 265 *U. S.* 86.

Brooks Scanlon Corp. vs. United States, 265 *U. S.* 106.

College Point Boat Club vs. United States, 267 *U. S.* 12.

An examination of these decisions discloses the following:

(a) In all of these cases the United States, or one of its agencies, was a party;

(b) In all of these cases, in which contracts were involved, the United States, or one of its agencies, was not only a party to the suit, but a party to the contract sued upon;

(c) In all of these cases, in which contracts were involved, the contracts were entered into prior to the signing of the Armistice;

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipment for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition,

(d) In none of these cases has this Court held that this Act conferred the power upon one individual to modify his private contract obligations with another, in fact, quite the contrary;

In Russell Motor Car Company vs. United States (supra) Justice Sutherland, in the course of his opinion, says:

> "The power to modify the obligations of a private contract is, to say the least, a most unusual one for governmental exercise. To modify a contract is in effect to make a new one, and it puts something of a strain on our conception of the functions of government to concede its power to make contracts between private parties to which neither may assent and which, consequently, neither will be bound to perform." (At page 520.)

In denying the Car Company the right to recover its anticipated profits in this case, the Court further says:

> "The contract, we must assume, was entered into with the prospect of its cancellation in view,

---

acquire or take over any part or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time." (Fed. Stat. Ann.—1918 Supp. 803-805.)

since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties." (At page 524.)

Bearing in mind the fact that the contract in the Russell case was made May 14, 1918, and directly with the United States, acting through the Secretary of the Navy, there can be no question that this Court's assumption as set forth in the preceding paragraph is a correct one, but how it can be assumed in this case, that petitioner entered into its contract with McLouth, with the prospect of its cancellation in view, where petitioner had no knowledge of McLouth's contracts with the Fleet Corporation, is beyond comprehension.

If the construction placed upon this Act by the Circuit Court of Appeals is correct, it is manifest that by the statute the Government interposes with its power to annul the covenants of a contract between two of its citizens and to transfer contract rights from one and vest them in the other.

IV.

Petitioner's contract was property.

"The contract in question was property within the meaning of the Fifth Amendment, Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 685, 690; Cincinnati vs. Louisville & Nashville R. R. Co., 223 U. S. 390, 400, and if taken for public use the government would be liable." *Omnia Commercial Co. vs. United States*, 261 U. S., at page 508.

"These contracts were protected, not only un-

der the constitutional provision referred to, but the right to these prospective profits, any advantage of value under them, was a species of property finding protection under both the Federal and State Constitutions, in the provisions that private property shall not be taken for public use without just compensation."

Danolds vs. State, 89 *New York* 36.

42 *American Reports*, 277, 280.

V.

There is still the question whether Congress has the power to deprive a party to a private contract of his property therein, without just compensation.

"The mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon."

United States vs. Cohen Grocery Co., 255 *U. S.* at page 88.

"The right to damages is property and an Act of Congress providing that an order of the President shall be a defense to an action is unconstitutional, so far as it assumes to defeat such right."

Griffin vs. Wilcox, 21 *Ind.* 370.

"A law which deprives a party of all legal remedy must necessarily be void. * * * And where a statute does not leave a party a substantial remedy, * * * it cannot be regarded as a regulation of the remedy, and is void."

Cooley Constitutional Limitations at page 289.

"But a vested right of action is property in the same sense in which tangible things are

property, and is equally protected against arbitrary interference."

Cooley Constitutional Limitations, at page 362.

No authority conferred by Congress justifies an invasion of private property to an extent amounting to an entire deprivation of its use and enjoyment, without compensation to the owner. (Richards vs. Terminal Co., 233 U. S. 546, 556.) The power of Congress to impair or modify a contract is confined to those instances where Congress, out of considerations of public policy, has been vested with the power to control or regulate the matters to which the contract relates. (Newman vs. Moyers, 47 App. Dec. 102.)

And in Capital Trust Co. vs. Calhoun, 250 U. S. 208, 218, where an Act of Congress limiting the amount of a fee payable out of an appropriation was attacked as divesting a pre-existing right and depriving the attorney of property, it was said:

> "The right to bind by contract and require performance of that contract are examples of that liberty and that protection and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate."
>
> "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the just compensation it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers

> and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so. * * * The value of property generally speaking, is determined by its productiveness—the profits which its use brings to the owner."
>
> *Monongahela Navigation Co. vs. United States*, 148 *U. S.* 312.

Although the Constitution does not prohibit Congress from passing a law impairing the obligation of a contract, the State of Michigan, where this contract was made, was a part of the Northwest Territory, formerly governed by the Ordinance of 1787. In that Ordinance it is declared:

> "That these articles shall be considered as articles of compact between the original states and the people and states in the said territory, and *forever remain unalterable*, unless of common consent, to wit:
>
> * * * * *
>
> And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed."

This Ordinance has never been repealed and, so far as this provision is concerned, has never been altered by mutual consent, which would require action by Congress and by all the states affected, or at least by the state in which the law impairing the contract is sought

to be made effective. The Ordinance does not limit this prohibition to local legislation, but applies equally to legislation by Congress when it provides that "no law ought ever to be made or *have force* in the said territory."

The Constitution preserves all rights created or acquired under the Confederation, which would include the right of all states carved out of the Northwest Territory, and their citizens, to the protection guaranteed by the Ordinance against any laws, from any source, impairing the obligation of contract.

We submit that the result of the judgment in this case permits McLouth to accomplish indirectly what the Government itself could not do directly.

VI.

The Act of June 15, 1917, does not apply.

To hold that this Act is controlling of the instant case it is necessary to hold that the Act applies:

(a) To an absolute and unconditional contract entered into between an individual and a private corporation;

(b) To a contract in which neither the United States, nor any agency thereof, is a party in any manner;

(c) Which contract is entered into nearly three months after the war is over;

(d) Which contract is never cancelled, requisitioned or modified by the United States nor any agency thereof;

(e) To a suit arising out of the breach of such contract and in which neither the United States nor any agency thereof is a party.

We believe that we have examined every reported decision of the Federal Courts, in which this Act has been construed, and we have been unable to find a single case in which the material facts were similar to the facts in this case, where it has been held that the Act is controlling.

VII.

Todd Drydock & Construction Corporation vs. Sumner Iron Works distinguished.

In concluding its opinion in this case, the Court of Appeals says:

> "The facts of this case are substantially identical with the facts involved in Todd Drydock & Construction Corporation vs. Sumner Iron Works, supra. In that case the Supreme Court denied certiorari. For this reason the decision in that case is especially persuasive." (R. 79.)

We submit that the learned Court of Appeals erred in stating that the facts in the two cases are substantially identical and it obviously erred further in assuming that the denial of certiorari in the Todd case afforded any implication that this Court affirmed that decision.

The Todd case is reported in 289 Fed. 217, certiorari denied, 263 U. S. 700, No. 363, October Term 1923.

We have examined a copy of the record filed in the Supreme Court in the Todd case and by comparing the undisputed facts in the Todd case with the undisputed facts in this case, we have the following result:

First. The first contract in the Todd case was en-

tered into June 5th, 1918, upwards of five months before the signing of the Armistice; the contract in this case was entered into February 5th, 1919, nearly three months after the signing of the Armistice (R. 5).

Second. The orders in the Todd case (from buyer to seller) specifically set forth—Emergency Fleet Corporation—and in accepting these orders the plaintiff (seller) in the Todd case specifically set forth—"It is understood that the deck machinery covered by the above orders, is to be used in connection with the construction of vessels which the Todd Drydock & Construction Corporation have contracted to build and construct for the United States Shipping Board Emergency Fleet Corporation,"—while in this case the contract is absolutely silent about any other contract that McLouth then had or might thereafter enter into with any person, firm or corporation (R. 5-10).

Third. Upon the trial of the Todd case the parties thereto entered into a stipulation as to facts which provided in part as follows:

> "The contract between the parties hereto for the construction by plaintiff of a number of winches was made for the purpose of outfitting the said twenty-four (24) steel steamships with deck machinery. Plaintiff at the time of entering into said contract for the construction of said winches, knew that said winches were to be used as deck machinery for the outfitting of said twenty-four (24) steel steamships *and knew that said twenty-four (24) steel steamships were under construction by the defendant for the United States* (italics ours) represented by said Fleet Corporation."

While in this case after the trial in the lower court, the District Court found as a fact:

> "That at the time plaintiff's contract was entered into with McLouth, the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation." (R. 61.)

Fourth. In giving its decision in the Todd case, the Circuit Court of Appeals quotes from the decision of this court in Duesenberg Motors Corp. vs. United States, 260 U. S. 115, as follows:

> "It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor, and the disappointment of profits from its contract which it was preparing to realize and would have realized. But it took that chance and has not now a legal claim against the government for reimbursement of its outlays. * * * There was no prophecy of the Armistice, its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took, and must abide the result."

In this case, how can it be held that the Armistice affected petitioner's contract right when the contract was not entered into until nearly three months after the signing of the Armistice? How can it be further held that petitioner took a chance upon the happening of the Armistice, or upon any other action of the Government, when petitioner had no information

whatever about any possible interest the Government could have in McLouth's contract with petitioner?

We are not criticising the decision in the Todd case; the facts are so materially different that the case has no application,—much less, can it be considered decisive of the instant case.

The Supreme Court said in United States vs. Carver, 260 U. S. 482, 490:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

VIII.

Petitioner was not a sub-contractor.

The Circuit Court of Appeals, disregarding the finding of fact by the District Court (R. 61) in its opinion, found that petitioner was a sub-contractor (R. 78).

In 37 Cyc. 340, appears the following definition of a sub-contractor:

> "An under contractor—one who takes under the original contract, and is to perform in accordance with the original contract, and presumably with knowledge of the terms and conditions of the original contract; one who contracts for the principal contractor."

The record in this case conclusively shows that petitioner was not a sub-contractor, but that petitioner's contract was an independent, private, separate and collateral agreement with McLouth.

IX.

Action of Fleet Corporation should not relieve McLouth.

The unfairness of the decision in this case is concretely illustrated from the record itself. In the first telegram of cancellation to McLouth from the Fleet Corporation under date of April 29, 1919, appears the following:

> "Permission is hereby given you subject to our final aproval to solicit and accept domestic work for private account for tonnage substantially equivalent to the tonnage covered by this suspension order." (R. 53-54.)

Bearing in mind the fact, that prior to May 6, 1919 (R. 56), petitioner had no knowledge whatsoever of McLouth's dealings with the Fleet Corporation, the result of the decision in this case places McLouth in the unique and profitable position of himself deciding whether or not he should compel petitioner to furnish to the last foot the lumber called for under the contract, or, whether he should cancel it without liability.

This is directly contrary to the decision of this Court in Guerini Stone Co. vs. Carlin, 240 U. S. 264, where the Court held that although the principal contract between the Government and the contractor gave the Government the right to suspend, as the contractor had not safeguarded himself by incorporating that provision into the sub-contract, he was not relieved from the damages caused the sub-contractor by such suspension.

It is also directly contrary to the holding of the Circuit Court of Appeals (Seventh Circuit) in the case

of American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, certiorari denied, 263 U. S. 709, in which it is stated:

> "If buyer had desired to condition its obligation upon the contingencies of war, it would have been easy to take up that question with seller."

In conclusion, we submit that this record presents a case of sufficient general importance, and containing sufficient apparent error, to justify its review by this Court by certiorari.

Respectfully submitted,

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Ferris D. Stone,
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Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 136

INDIAN-DAY LUMBER COMPANY,

Petitioner,

vs.

SYDNEY C. McLOUTH,

Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,

Respondent.

PETITIONER'S BRIEF.

W. A. WEEKS,
Robert T. Hough,
Clinton L. Ostrander,
Frank D. Stuart,
William A. Shaw,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 126

INGRAM-DAY LUMBER COMPANY,

Petitioner,

vs.

SYDNEY C. McLOUTH,
Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,

Respondent.

PETITIONER'S BRIEF.

W. A. WHITE,
SIDNEY T. MILLER,
GEORGE L. CANFIELD,
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IN THE SUPREME COURT OF THE UNITED STATES

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Revived against THE AMERICAN LOAN & TRUST COMPANY, Administrator of the Estate of Sydney C. McLouth, Deceased,

Respondent.

PETITIONER'S BRIEF.

Official reports of opinions delivered in court below.

District Court Opinion, 6 Fed. (2d) 471.

Circuit Court of Appeals, 13 Fed. (2d) 581.

STATEMENT OF JURISDICTION OF SUPREME COURT.

(1) This is an action of assumpsit commenced by the Ingram-Day Lumber Company, a Wisconsin corporation, in the District Court of the Unted States for the Eastern District of Michigan, Southern Division, against Sydney C. McLouth, a citizen and resident of Marine City, Michigan, for the recovery of damages for breach of contract in an amount not exceeding one hundred thousand dollars. (R. 1-4.) Judgment was entered in the District Court June 1, 1925 (R. 39). On writ of error this judgment was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit on June 30, 1926 (R. 73).

(2) It was contended by petitioner in the District Court and in the Court of Appeals (R. 63-65):

(a) That the admission in evidence, both oral and documentary, of McLouth's transactions with the Fleet Corporation, was erroneous.

(b) That the District Court having found as a fact that petitioner had been damaged by McLouth's breach of contract in the amount of $42,789.96, erred in rendering judgment for petitioner for the sum of $647.65.

(c) That the Court erred in permitting McLouth to file an amended plea.

(d) That the Court erred in holding that the cancellation by the Fleet Corporation of its contracts

with McLouth, permitted McLouth to in turn cancel his contract with petitioner.

(e) That the Court erred in failing to find as a matter of fact that the United States Government, or any agency thereof, never modified, suspended, cancelled or requisitioned the contract between petitioner and McLouth.

(f) That the Court erred in holding that the Act of June 15, 1917, applied to this contract.

(3) Certiorari was prayed under Section 240 of the Judicial Code as amended by Act of February 13, 1925.

U. S. Comp. Stat., Cum. Supp. 1925, *Chap.* 10, *Par.* 1217.

STATEMENT OF CASE.

Petitioner, a Wisconsin corporation, having its principal place of business at Lyman, Mississippi (R. 35), entered into a written contract on February 5, 1919, with respondent's intestate, one Sydney C. McLouth of Marine City, Michigan, wherein petitioner agreed to sell and McLouth to buy certain lumber at a definite price per thousand feet (R. 5-10). McLouth had previously contracted with the United States Shipping Board Emergency Fleet Corporation for the building of tugs (R. 51-52). The contract between McLouth and petitioner made no mention of the Fleet Corporation contracts nor did it contain any provision for cancellation (R. 5-14). The District Court found as a fact that at the time of entering into said contract

petitioner did not know that McLouth had a contract with the Fleet Corporation, or that the tugs mentioned in the instant contract were in fact being built for that corporation (R. 36, 61).

On April 29, 1919, by telegram (R. 53) the Fleet Corporation notified McLouth to suspend work on certain hulls and to "order all work stopped on commitments made * * * as to these hulls." The telegram also stated "Permission is hereby given you subject to our final approval to solicit and accept domestic work for private account for tonnage substantially equivalent to the tonnage covered by this suspension order." On September 17, 1919, the Fleet Corporation by letter (Ex. 10, R. 55) notified McLouth that his contracts with the Corporation "are hereby cancelled" as to certain hulls. Said letter also stated "You (McLouth) are hereby directed to notify all sub-contractors affected by this cancellation."

On May 6, 1919, McLouth's agent sent petitioner a telegram reading, "McLouth advises tug contracts cancelled. Stop further shipments pending instructions." (R. 47.) Petitioner thereupon ceased manufacturing the contracted lumber, but refused to accede to cancellation. (R. 48.)

Suit was brought by petitioner against McLouth in the District Court of the United States for the Eastern District of Michigan, Southern Division, to recover damages caused by McLouth's breach of his contract (R. 1-14). McLouth appeared by the United States District Attorney and pleaded the general issue (R. 14-15). Thereafter McLouth died and the suit was revived against respondent, his administrator, who ap-

peared by the Assistant United States District Attorney and pleaded the general issue (R. 21-22). A jury was waived (R. 23) and the case tried by the Court. Respondent was permitted over petitioner's objection to introduce his contracts with the Fleet Corporation and their subsequent cancellation (R. 51-55). The District Judge made findings of fact and law. He determined petitioner's total damages at $42,789.96, of which amount $42,142.31 represented lost profits (R. 61). This item he disallowed, relying on Todd Dry Dock and Construction Corporation vs. Sumner Iron Works, 289 Fed. 217 (certiorari denied, 263 U. S. 700) and entered judgment for $647.65 (R. 39-40). This was affirmed by the United States Circuit Court of Appeals for the Sixth Circuit (R. 73), said court likewise relying on the Todd Case, supra, and in apparent disregard of the District Judge's findings, holding petitioner a sub-contractor (R. 78).

SPECIFICATION OF ERRORS RELIED ON.

First. Said Circuit Court of Appeals erred in affirming the judgment of the District Court.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the District Court, and in not remanding said cause to said District Court with instructions to enter judgment for petitioner in the sum of $42,789.96.

Third. Said Circuit Court of Appeals erred in affirming the rulings of the District Court permitting the introduction in evidence of McLouth's transactions with the Fleet Corporation.

Fourth. Said Circuit Court of Appeals erred in holding that petitioner was not entitled to judgment for its damages amounting to $42,789.96.

Fifth. Said Circuit Court of Appeals erred in limiting petitioner's recovery to the sum of $647.65.

Sixth. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, conferred the power to modify the obligations of a private contract.

Seventh. Said Circuit Court of Appeals erred in holding that the Act of June 15, 1917, 40 U. S. Statutes at Large 182, applied to this case.

Eighth. Said Circuit Court of Appeals erred in holding that petitioner was a sub-contractor.

Ninth. Said Circuit Court of Appeals erred in holding that the law permitted no recovery of lost profits.

Tenth. Said Circuit Court of Appeals erred in holding that the cancellation by the Fleet Corporation of its contracts with McLouth conferred upon McLouth the power to cancel his contract with petitioner.

SUMMARY.

Petitioner contends:

1. That the contract in question was a private contract, to which the United States is not a party and in which it is not interested.

2. That the contract, having been entered into nearly three months after the Armistice and the conclusion of the war, is to be construed in a just, reasonable and usual manner as such private contract and that resort is not to be had to inference, innuendo, or conjecture, to deprive petitioner of its rights under said contract.

3. The doctrine of Frustration contended for by respondent is not applicable to the instant facts.

4. That the Act of June 15, 1917 (40 Stat. 182) has no application to the case at bar because

(a) It was not as a fact invoked, and

(b) The instant contract was not a sub-contract.

BRIEF OF ARGUMENT.

I. The United States Not a Party.

Under the constitution and judicial code petitioner, because of diversity of citizenship, had a right to sue McLouth in the United States Court. This is a suit between a corporation and an individual. There is no provision of law whereby the United States Government may substitute itself as respondent, nor prevent the law taking its course as to the respondent, and it is submitted that the United States District Attorney is not acting in his official capacity. It is the certain right of petitioner to have his case considered by this Court free from the inference that the presence of the District Attorney naturally presents.

II. Contract Entered Into After the Armistice.

The contract in question was entered into on February 5, 1919, nearly three months after the conclusion of the World War. It was for a commodity, lumber, in general use in shipbuilding and in trade in industry. It breathed not a word with reference to the Fleet Corporation contracts and as found by the District Judge (R. 36) petitioner knew nothing of said contracts. The contract had no provision for cancellation. Had the general price of lumber advanced rather than declined, McLouth would doubtless have insisted upon delivery and the most ingenious counsel would be unable to devise an argument excusing petitioner from performance. Indeed the preliminary order of suspension graciously allowed McLouth to accept domestic work and use petitioner's contract. But it is now said, the shoe being on the other foot, that petitioner can receive nothing but "just compensation" excluding profits he would have made, and to arrive at this conclusion it is necessarily contended that the letter ordering McLouth to "notify all subcontractors affected by this cancellation" and the notice given by McLouth to petitioner was a delegated exercise of the power granted by the President by the Act of June 15, 1917, cancelling the very contract in question although petitioner knew not of the existence of the Fleet Corporation contracts. The attorney for respondent goes to great length to demonstrate that the Armistice had no legal significance whatsoever and that the Treaty of Peace, long delayed as to the United States for reasons well known to this Court, and the Presidential Proclamation ended the war. We do not quarrel with the learned counsel but protest against a forced, unnatural, unjust, and inferential construction being

placed upon the facts in this case under the plea and guise of the exigencies of war. The war did as a matter of physical fact terminate with the Armistice.

III. Respondent's Theory of Frustration.

It is contended by respondent's attorney that the contract was frustrated and McLouth excused from performance thereof by the act of the Fleet Corporation in cancelling McLouth's contracts with it, this wholly aside from the claimed cancellation of the instant contract. The doctrine of frustration is well grounded in law and is not disputed by petitioner. It rests upon the theory that in a specific case the parties are deemed to have contracted for the happening of a future event (Coronation Cases), the continuance of life in contracting party (personal service contracts) or the continued existence and/or availability of the subject of the contract (Charter Party Cases). It is elementary and fundamental and the very foundation of the doctrine that both parties must have knowledge of the event to happen, or the thing to be continued in existence. How can this doctrine be said to be applicable to this case? The petitioner had no knowledge whatsoever of the existence of the Fleet Corporation contracts. How can the cancellation of these contracts invoke the doctrine of frustration? All of the frustration cases cited by respondent in the court below may be differentiated from the case at bar. We now point out with respect thereto the thing or event contracted for:

Omnia Commercial Company vs. United States, 261 U. S. 502, (Continuing availability of specific steel plate).

The Frankmere, 262 Fed. 819, (The continued existence or availability of the steamship Frankmere).

Allan Wilde Corporation vs. Vacuum Oil Company, 248 U. S. 377, (Continuance of legal ability of steamer Allan Wilde to make voyage).

International Paper Company vs. The Gracie D. Chambers, 248 U. S. 387, (Same as Allan Wilde).

The Texas Company vs. Hogarth Shipping Company, Ltd., 256 U. S. 619, (Continued existence and availability of ship "Baron Ogilvy").

The Kronprinzessin Cecilie, 244 U. S. 12, (Possibility of peaceful navigation).

The fact that some of these contracts, if not all of them, were frustrated by the act of the Sovereign is no more significant and leads to no different result than if, for example, the steamer Frankmere had been destroyed by fire or other casualty before the time set for the commencement of the charter.

That the existence of a principal contract with the Government giving the Government the right to suspend is not such a fact or circumstance that the suspension of the principal contract frustrates even a subcontract is clearly held by this Court in the case of Guerini Stone Company vs. P. G. Carlin Construction Company, 240 U. S. 264, so that even if the petitioner had known of the existence of the Fleet Corporation contracts and had been admittedly a subcontractor, the doctrine of frustration would be inapplicable, a fortiori when one of the contracting parties

is in ignorance of the very existence of the principal contract.

IV. Act of June 15, 1917, (40 Stat. 182).

We now come to discuss the effect of the above act of Congress, the relevant parts of which are set forth in the margin hereof (1):

(1) "The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and their equipment necessary to operation.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order."

It is the claim of the respondent that the order from the Fleet Corporation to McLouth to notify all sub-

contractors affected by this cancellation (Ex. 10, R. 55) and McLouth's telegram to petitioner advising of cancellation (R. 47) constituted a proper exercise by delegation of the power vested in the President by the act of Congress in question. The case of Todd Dry Dock & Construction Corporation vs. Sumner Iron Works, 289 Fed. 217, (Certiorari denied, 263 U. S. 700) is relied upon as supporting that contention. An examination of the record filed in the United States Supreme Court in this case upon the petition for certiorari indicates the following facts which decisively distinguish that case from the case at bar.

"(1) The first order from the Todd Construction Co. to the Sumner Iron Works was dated June 5th, 1918.

(2) This order contained the following paragraph:

> 'Please enter our order for the following list of Winches our vessels No. 8 to No. 17 Emergency Fleet Contract No. 85.'

(3) This order and subsequent orders were acknowledged by the Sumner Iron Works as follows:

> 'We hereby formally acknowledge receipt of your orders for deck machinery as follows: No. 8 to No. 17, inclusive, Emergency Fleet Corporation Contract No. 85.
>
> 'Order No. 29, dated August 17, 1918, Winches for vessels No. 18 to 31, inclusive, Emergency Fleet direct contract S. C. 433.
>
> 'Order No. 192, dated August 29th, 1918. Steering Gear for vessels 8 to 31 inclusive, Emergency Fleet direct contract S. C. 433.'

"The Sumner Iron Works accepts these orders under the following terms and conditions: * * *

'Seventh: It is understood that the deck machinery covered by the above orders, is to be used in connection with the construction of vessels which the Todd Dry Dock & Construction Corporation have contracted to build and construct for the United States Shipping Board Emergency Fleet Corporation, and that the Sumner Iron Works will be furnished in connection with the orders mentioned, with a Class A-5 Priority or better.'

"(4) In the answer filed by the Todd Dry Dock & Construction Corporation to the complaint of the Sumner Iron Works, appears the following:

III.

'That during all of said times defendant was the agent of said Fleet Corporation and the United States Government for the construction of certain steel vessels at defendant's shipbuilding plant in Tacoma, Washington, which fact was at all times well known to said plaintiff, and that the winches, machinery and material referred to in the complaint herein was ordered for use upon said vessels, and not otherwise, which plaintiff well knew.'

IV.

'That all writings signed or delivered by defendant to plaintiff, and all things said or done by defendant, in connection with the matters alleged or mentioned or referred to in the complaint or this amended answer herein, were sign-

ed, delivered, said or done by defendant solely as the agent of said Fleet Corporation and the United States Government, and for and in connection with such vessels so to be constructed by defendant for said Fleet Corporation and the United States Government, and not otherwise; all of which was at all times well known to plaintiff.'

"(5) Upon the trial of this case the parties thereto entered into a stipulation as to facts which provided in part as follows:

III.

'The contract between the parties hereto for the construction by plaintiff of a number of winches was made for the purpose of outfitting the said twenty-four (24) steel steamships with deck machinery. Plaintiff at the time of entering into said contract for the construction of said winches, knew that said winches were to be used as deck machinery for the outfitting of said twenty-four (24) steel steamships and knew that said twenty-four (24) steel steamships were under construction by the defendant for the United States represented by said Fleet Corporation.'

"(6) And lastly, in giving its decision of this case the Circuit Court of Appeals in the course of its opinion, says:

'It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor and the disappointment of profits from its contract which it was preparing to realize and would have

> realized. But it took that chance and has not a legal claim against the government for reimbursement of its outlays. * * * There was no prophecy of the Armistice; its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took and must abide the result.' (289 Fed. 220.)"

It is submitted that the facts in the case of American Chain Company vs. Interstate Iron & Steel Company, 291 Fed. 1006, (Seventh Circuit) (Certiorari denied, 263 U. S. 709) are more applicable to the facts in this case than were the facts in the Todd Case, supra. Here the contract involved 4,800 tons of round iron bars of from one to three inches in diameter. The contract was signed October 24, 1918, and after 3,200 tons had been taken the buyer repudiated its obligation to take and pay for the remaining 1,600 tons, the defense being that on February 16, 1918, the Emergeny Fleet Corporation had engaged the buyer to furnish 140 anchor chains to be used on troop ships and that the contract with the plaintiff seller had been made for the purpose of getting material from which to make the said chains, as the seller well knew, and that the United States through its proper agent had in March, 1919, cancelled the contract. The Circuit Court of Appeals says, on page 1008:

> "If seller's knowledge that buyer had a contract with the government for anchor chains and would use round iron bars in making the anchor chains was a justification of buyer's repudiation, then similarly seller's unconditioned contract with the furnace company for pig iron could be

> repudiated, and the furnace company's unconditioned contract with the mining company for ore could be repudiated, and so on back to the ultimate of rawness in all materials."

It is to be borne in mind that the subject-matter of the contract in the instant case was lumber, a standard commodity, 115,000 feet of which the plaintiff was engaged in manufacturing at the time of the attempted cancellation and which was remanufactured into sizes and dimensions suitable for sale in plaintiff's regular trade and was sold in the ordinary course of its business (R. 48).

To come even inferentially within the scope of the proposed cancellation, it is necessary to assume that the contract in question was a sub-contract. In 37 Cyc. 340 a sub-contractor is defined as follows:

> "An under contractor—one who takes under the original contract, and is to perform in accordance with the original contract, and presumably with knowledge of the terms and conditions of the original contract; one who contracts for the principal contractor."

Petitoner's contract was an independent contract with McLouth and it cannot be placed in the status of a sub-contractor without its knowledge and consent. Had McLouth accepted the permission given him by the Fleet Corporation to solicit domestic work for private account for tonnage equivalent to that called for by the Fleet Corporation contracts, could petitioner have claimed it was relieved from its contract either on the theory of frustration or that its contract was cancelled through the cancellation of the Fleet Cor-

poration contracts? There is an inherent inequity in placing McLouth in the profitable position to himself decide whether or not he should compel the petitioner to furnish the lumber for the contract price or whether he should cancel it without any liability to himself.

We now come to a discussion of the decision of this Court in the case of Russell Motor Car Company vs. United States, 261 U. S. 514, in which Mr. Justice Sutherland laid down the doctrine that just compensation provided for by the act of Congress in question does not include anticipated profit. It is said on page 523,

> "In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed. It is evident that no prudent person, desiring to acquire this contract, would have paid for it the full amount which could be realized upon completion, leaving no chance of return to himself upon the investment or for the risk and labor incident to its performance. The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties."

It is to be noted that the Russell Motor Car Company Case involved a contract for certain war material directly with the United States, the power of cancellation resting in one of the parties to the contract. This

could be said to be within the contemplation of the parties. In the instant case the contract was a private contract between two individuals not tied up in any manner as a subcontract to a contract with the Sovereign and, while it may be conceded for the purpose of argument that it was within the power of the Sovereign to requisition or cancel the contract, a taking of the contract without including in just compensation the amount which the contract was reasonably worth is certainly not within the decision in the Russell Motor Car Company Case and is wholly at variance with the decisions of this Court.

In the case of Monongahela Navigation Company vs. United States, 148 U. S. 312, in which the Court says on page 326,

> "The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

The Monongahela Case involved the condemnation of a lock and dam and it was held that compensation included the value of the franchise to exact tolls as well as the value of the tangible property taken and the Court says on page 329, "So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls."

To the same effect is the case of Seaboard Air Line Railway Company et al. vs. United States, 261 U. S. 299, holding as did the Monongahela case that the ascertainment of just compensation is a judicial function and that the compensation to which the owner is entitled is the full and perfect equivalent of the property taken, including in that particular case interest at a proper rate upon the award.

See also Richards vs. Terminal Company, 233 U. S. 546; Capital Trust Company vs. Calhoun, 250 U. S. 308.

It is, therefore, submitted that the decision of the District Judge and of the Circuit Court of Appeals in the case at bar are in error and that the same should be remanded with instructions to enter judgment for the petitioner for the full amount claimed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 642

INGRAM-DAY LUMBER COMPANY, PETITIONER

v.

SYDNEY C. MCLOUTH (REVIVED AGAINST THE AMERICAN LOAN AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

I

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, appears at pages 74–79 of the Transcript of Record, and is reported in 13 F. (2nd) 581. The opinion of the District Court appears at pages 35–39 of the Transcript of Record, and is reported in 6 F. (2nd) 471.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1926. (R. 73.) The petition for certiorari was filed on September 16, 1926.

THE QUESTION

The only substantial question involved in this case is whether upon cancellation by the Government of a contract for the construction of vessels for it, as authorized by subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917 (c. 29, 40 Stat. 182), and the cancellation by the contractor, pursuant to the directions of the Government, of a subcontract for the manufacture of materials to be used in the performance of the main contract, the subcontractor is entitled to recover from the main contractor for the loss of profits which might have been earned upon completion of the subcontract.

STATEMENT

The United States Shipping Board Emergency Fleet Corporation, acting on behalf of the United States, canceled, as authorized by subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917 (c. 29, 40 Stat. 182), a contract between it and McLouth, under which McLouth was to build certain wooden ocean-going tugs, and directed McLouth to notify all subcontractors affected by the

cancellation. (R. 53–55.) This was the method usually employed by the Emergency Fleet Corporation in canceling subcontracts. (R. 53.) Pursuant to such directions McLouth canceled his contract with petitioner, under which petitioner was to furnish certain lumber to be used in the performance of the main contract. (R. 48.) This lumber was to be manufactured in special sizes and shapes, not suitable for petitioner's regular trade. (R. 5–13, 48.) All lumber manufactured and delivered prior to the cancellation of petitioner's contract was paid for by McLouth, but in addition to the lumber manufactured and delivered, petitioner at that time had partially manufactured other lumber for delivery under its contract with McLouth. (R. 47.) After the cancellation of the contract between McLouth and petitioner the undelivered lumber was remanufactured for sale in petitioner's regular trade and was sold in the ordinary course of its business. (R. 48.)

Petitioner brought suit against McLouth in the United States District Court for the Eastern District of Michigan for the alleged breach of its contract with him. (R. 1–14.) After the suit was commenced McLouth died, and the suit was revived against the American Loan and Trust Company, his administrator. (R. 16–22.) Trial by jury was waived and the parties stipulated that the issues of fact might be tried and determined by the court. (R. 23.) The court made the following findings of fact (R. 36):

(1) That at the time plaintiff's contract was entered into with McLouth the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

(2) That if plaintiff's lost profits constitute a proper element of damage that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.

(3) That if plaintiff's lost profits under the contract are not an element of damage that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract.

The court held that the petitioner's lost profits were not recoverable and rendered judgment for the petitioner for six hundred and forty-seven dollars and sixty-five cents. (R. 36–39.) The case was taken to the Circuit Court of Appeals by petitioner by writ of error, and the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 73.)

THE STATUTES

The applicable portions of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, are as follows (40 Stat. 182, 183):

The President is hereby authorized and empowered, within the limits of the amounts herein authorized— * * *

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material. * * *

* * * * *

Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

PETITIONER'S CONTENTION

Petitioner does not question that the Emergency Fleet Corporation had power, as an agency of the President, under the statute quoted above, to cancel the contract between it and McLouth. Nor does it question that anticipated profits are not an element of just compensation for cancellation of a contract pursuant to the statute. *Russell Co.* v. *United States*, 261 U. S. 514, 523. The sole substantial contention of petitioner, stated in its brief in many different ways, is that since the subcontract here in question between McLouth and petitioner was a contract between private individuals which did not refer to the contract between McLouth and the Emergency Fleet Corporation, and petitioner did not know of the latter contract, the Urgent Deficiencies Appropriation Act of June 15, 1917, did not authorize the cancellation of the subcontract, and that petitioner is therefore entitled to recover damages for breach thereof and not merely just compensation for its cancellation.

ARGUMENT

The petitioner's contention is practically disposed of by the opinion of this Court in *Russell Co.* v. *United States*, 261 U. S. 514. The contention in that case was that power to cancel contracts under subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, was restricted to private contracts and did not apply to contracts to which

the United States was a party. The Court said (page 519):

> It must be apparent, we think, that the words of the provision, "*any* existing or future contract," read with literal exactness, include all contracts, whether private or governmental. But it is pointed out that the power to "requisition" can not apply to a governmental contract; and this may be conceded, since the Government can not requisition what it already has. Then it is said that inasmuch as the application of the word "requisition" must be confined to private contracts, the other words associated with it must be likewise restricted by virtue of the maxim *Noscitur a sociis*.

On pages 520–521 the Court disposed of this contention as follows:

> There is nothing in the rule or in the statute which requires us to assimilate the words "modify" and "cancel" to the scope of the word "requisition," simply because the latter has a necessarily narrower application. The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu*, giving to each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate "requisition" will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

The court further said, on pages 521–522:

> This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The Government was confronted with the vital necessity not only of producing ships and supplies in unprecedented quantities, but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become not only unnecessary but wasteful. Not to provide, therefore, for the cessation of this production when the need of it had passed would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the Nation's power, but that it should come to an end as soon as possible upon the passing of the emergency. In the light of these circumstances it is not unreasonable to regard the statute now under consideration as intended to accomplish both results; that is, (1) to enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost,

and then, (2) upon the passing of the emergency, to enable him to utilize these same powers to stop that production as quickly as possible.

The holding of the Court in the *Russell case*, therefore, is that the President, or his authorized agent, had power under the statute to cancel *any* contract, public or private, (1) during the emergency, to stimulate production to the utmost, and (2) upon the passing of the emergency to stop that production as quickly as possible. The argument of the petitioner that there was no authority for the cancellation of the subcontract in this case, because it did not refer to the principal contract and the petitioner did not know of the principal contract, rests upon an entire misconception of the nature of the power of cancellation granted by the statute. This power is one of eminent domian; it does not rest upon any notice to or consent by the party affected by the cancellation. See *Russell Co.* v. *United States*, *supra.*, at page 523. Petitioner's argument, in effect, is that the Government can not exercise the power of eminent domain to take or destroy property unless the owner of the property, at the time he acquired it, knew of the public necessity which required the taking or destruction. The mere statement of the proposition demonstrates its absurdity. As the Emergency Fleet Corporation was interested in the cancellation of the subcontract and did cancel it, it is entirely immaterial that petitioner had no previous

notice of the interest of the Emergency Fleet Corporation. Cases such as *Guerini Stone Co.* v. *Carlin*, 240 U. S. 264, referred to several times in petitioner's brief, where the question is whether a subcontractor is bound by provisions of the general contract, have, of course, no bearing. There is no claim that petitioner was bound by any provision of the contract between McLouth and the Emergency Fleet Corporation.

The principles stated above were applied in *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works* (C. C. A., 9th Circuit), 289 Fed. 217; certiorari denied, 263 U. S. 700. In that case it appeared that the Emergency Fleet Corporation had entered into a contract with the Todd Corporation for the construction of certain vessels, and the Todd Corporation had entered into a contract with the Sumner Iron Works to furnish certain materials for the vessels. The Fleet Corporation cancelled the contract with the Todd Corporation and directed the Todd Corporation to notify all subcontractors affected by the cancellation. Notice of cancellation was duly given by the Todd Corporation to the Sumner Iron Works. The Sumner Iron Works thereafter sued the Todd Corporation to recover damages for the breach of the subcontract. The only question was whether the Sumner Iron Works could recover for anticipated profits, since it had already received more than the amount of all of

its other claims. The court held that there could be no recovery. After referring to the Act of June 15, 1917, it said (pages 219–220):

> The duration of the war and the necessities of the government were both uncertain, and it was the part of prudence on the part of Congress to provide for the cancellation of all contracts imposing future obligations upon the government as soon as public safety and public necessity would permit. The act should receive a liberal construction to that end, and the construction placed upon it by the department charged with its execution is of great weight. The authority to suspend or cancel extended, in our opinion, not only to the principal contract, but to all subcontracts for material and labor, the performance of which would impose further obligations upon the government.
>
> We are not now directly concerned with the claim of the Todd Corporation against the Fleet Corporation or against the United States; but, if the present judgment is permitted to stand, how can the amount of the judgment be excluded from the just compensation to which the Todd Corporation is entitled as against the government? It is said that the Todd Corporation should have provided against such a contingency by contract, and, had it done so, the contract price would have been much higher. But the reservation of rights conferred by law is wholly unnecessary. The contract was canceled, not by the Todd Corporation, but by the author-

> ized representative of the President of the United States, and the Todd Corporation was under no obligation to warn the defendant in error that that authority might be exercised at any time. The principal contract itself contained no such reservation. Doubtless the Fleet Corporation deemed the authority reserved by law ample for its protection. That authority is read into every contract, and is notice to all, and is binding upon all.

Petitioner urges that certiorari should be granted because a conflict of decisions exists between the Circuit Court of Appeals for the Sixth Circuit, which rendered the decision in this case, and the Circuit Court of Appeals for the Seventh Circuit, which decided the case of *American Chain Co.* v. *Interstate Iron & Steel Co.*, 291 Fed. 1006; certiorari denied, 263 U. S. 709. An examination of the decision in the *Chain Company case*, however, makes it quite clear that it in no way conflicts with the decision of the Circuit Court of Appeals for the Sixth Circuit in the present case or the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Todd case*.

The Chain Company case was a suit by the seller against the buyer for breach of a contract for the purchase of 4,800 tons of round iron bars of from 1 to 3 inches in diameter, and of such "standard sizes, shapes, and sections as are within seller's regular range of practice." The buyer took and paid for 3,200 tons, and repudiated its obligation to take

and pay for the remaining 1,600 tons. The only asserted defense was that the Emergency Fleet Corporation engaged the Chain Company (the buyer) to furnish 140 anchor chains to be used on troop ships; that the links were to be 2½ inches in diameter; that buyer's contract for iron bars was made for the purpose of getting the material from which to make the anchor chains, as seller well knew; and that after buyer had furnished 70 chains, the United States, through its proper agent, canceled the contract for the remaining 70 chains, and thereupon buyer notified seller that it canceled the contract for the remaining 1,600 tons of bars.

The court, overruling the defense, said, on pages 1007–1008 (italics ours):

> Under the Act of June 15, 1917 (40 Stat. 182), relating to war-time powers of the President, and the Merchant Marine Act of June 5, 1920 (41 Stat. 988), which repealed the Act of June 15, 1917, the President through governmental agencies was authorized to cancel contracts for the purchase of ships or ship material, and if the person who was entitled to "just compensation" was not satisfied with the amount fixed by governmental agencies, he was authorized to sue the United States.
>
> *But no governmental agency ever entered into any contract with this seller of iron bars, or ever directed or required this buyer so to contract, or ever requisitioned or modified or canceled this contract in suit, or ever directed*

or required buyer to modify or cancel this contract.

* * * * *

Of the 3,200 tons taken by buyer, less than 100 tons was of sufficient diameter for the anchor chains called for in buyer's contract with the government. If buyer's specifications for the untaken 1,600 tons had continued at the same ratio, less than 50 tons would have been suitable for the anchor chains. The inference is not a strained one that the bulk of buyer's business was in making chains other than 2½-inch anchor chains.

In the contract not only was there no stipulation that the iron bars were to be used in making 2½-inch anchor chains for troop ships, and that the material should be of quality and size suitable for that purpose, but buyer took the privilege of specifying any sizes it pleased from 1 to 3 inches, and seller made the condition that the bars were to be within its regular range of practice. Therefore seller, instead of being a subcontractor to perform a part within buyer's contract with the government, was an independent seller of the standard product which it was offering generally in the market.

If seller's knowledge that buyer had a contract with the government for anchor chains and would use round-iron bars in making the anchor chains was a justification of buyer's repudiation, then, similarly, seller's unconditioned contract with the furnace company for pig iron could be repudiated, and the furnace company's unconditional

> contract with the mining company for ore could be repudiated, and so on back to the ultimate of rawness in all materials.

The court added that it was not able to see how the Government touched either the subject matter of the contract or the parties in a way to render the contract impossible of performance.

It is clear that the court in the *Chain Company case* did not consider at all the question whether the Emergency Fleet Corporation had power, under the Act of June 15, 1917, to cancel the contract for the iron bars. It was sufficient for the decision that there had been no attempt to effect such cancellation.

The decision of the Circuit Court of Appeals in the present case that the Act of June 15, 1917, authorizes cancellation of any contract, whether or not the United States is a party thereto, and whether it is a principal contract or a subcontract, is in accord with *Russell Co.* v. *United States*, 261 U. S. 514, and *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works*, 269 Fed. 217, and neither *American Chain Co.* v. *Interstate Iron & Steel Co.*, 291 Fed. 1006, nor any other case which we have found, or to which our attention has been called, supports a conflicting view.

Some of the petitioner's other contentions merit extended consideration. It would probably be enough to say of all of them that they present no question of the class which this Court will grant

certiorari to review. In addition we believe none of them has any merit.

It is not clear from petitioner's brief whether it is contended that the notice given to it by McLouth under directions of the Emergency Fleet Corporation was not sufficient to effect a cancellation by the Emergency Fleet Corporation of the contract between petitioner and McLouth. If such contention is made, it should be noted that the notice was given in the manner usually employed by the Emergency Fleet Corporation in cancelling subcontracts (R. 53), and that a notice given in precisely the same manner was held in the *Todd case* to be a cancellation "not by the Todd Corporation, but by the authorized representative of the President of the United States." In addition, even if the notice was not properly given, and the contract was not canceled, it is clear that the Emergency Fleet Corporation intended, and had the right, to cancel the contract. This right of cancellation, in any event, as said by this Court in *College Point Boat Co.* v. *United States*, 267 U. S. 12, 16—

> operated to curtail the damages recoverable. It limited the value of the plaintiff's right to require performance, and hence the amount and character of the loss for which compensation must be made. Prospective profits were not recoverable.

It was within the discretion of the trial court to permit the respondent to amend its plea after the

trial. *Mexican Central Railway* v. *Duthie*, 189 U. S. 76; *Norton* v. *Larney*, 266 U. S. 511.

The petitioner's argument that "there is still the question whether Congress had the power to deprive a party to a private contract of his property therein, without just compensation," has no possible application to this case. The Act of June 15, 1917, expressly provides for just compensation.

CONCLUSION

The only substantial question in the case has been decided adversely to the petitioner in *Russell Co.* v. *United States*, 261 U. S. 514, and *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works*, 289 Fed. 217, and there are no conflicting decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 126

INGRAM-DAY LUMBER COMPANY, PETITIONER

v.

SYDNEY C. MCLOUTH, REVIVED AGAINST THE AMERICAN LOAN & TRUST COMPANY, administrator of the estate of Sydney C. McLouth, deceased

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 35) is reported in 6 F. (2d) 471. The opinion of the Circuit Court of Appeals (R. 74) affirming the judgment of the District Court is reported in 13 F. (2d) 581.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1926. (R. 73.) Petition for certiorari was filed September 16, 1926, and

granted November 23, 1926 (R. 80), under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The United States Shipping Board Emergency Fleet Corporation cancelled a contract for the construction of vessels for it, as authorized by subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, 40 Stat. 182; and directed the contractor to cancel all subcontracts, which he did. In this, an action by a subcontractor against the general contractor for breach of contract, the principal questions presented are:

1. Did the Emergency Fleet Corporation have power under the statute to cancel a subcontract to which it was not a party?

2. If the Emergency Fleet Corporation had such power, did cancellation of the subcontract by the general contractor pursuant to the directions of the Emergency Fleet Corporation amount to cancellation of the subcontract by the Emergency Fleet Corporation?

3. Upon such cancellation, is the subcontractor entitled to maintain against the general contractor an action for damages for breach of contract and recover in it for the loss of profits which might have been earned if the subcontract had been completely performed, or is his remedy against the

United States for just compensation for the value of the expropriated contract?

STATUTES AND EXECUTIVE ORDERS INVOLVED

The applicable portions of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, 40 Stat. 182–183, are as follows:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> * * * * *
>
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> * * * * *
>
> Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner

> provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.
>
> The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time * * *.
>
> * * * * *
>
> All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire.

The Emergency Shipping Fund provisions of the Act of June 15, 1917, were amended by the Act of April 22, 1918, c. 62, 40 Stat. 535, and the Act of November 4, 1918, c. 201, 40 Stat. 1020, 1022, in respects not material in the present case.

The Merchant Marine Act, 1920 (Act of June 5, 1920, c. 250, 41 Stat. 988), repealed the provisions quoted above, but Section 2 (b) (2) (U. S. C., Title 46, Sec. 862) provided that—

> All rights, interests, or remedies accruing or to accrue as a result * * * of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner * * * as if this Act had not been passed.

By Executive Orders dated July 11, 1917, and December 3, 1918, the President delegated to the

Emergency Fleet Corporation all power and authority vested in him by the Act of June 15, 1917, with reference to the construction of ships. These Executive Orders are set forth in the Appendix.

STATEMENT

This is an action for damages for breach of contract.

Under dates of August 21, 1918, and September 17, 1918, the Emergency Fleet Corporation entered into two contracts with Sydney C. McLouth, the respondent's intestate, under which McLouth agreed to construct for the Emergency Fleet Corporation certain ocean-going tugs for a lump-sum price of $232,000 each. (R. 51–52.) On February 5, 1919, McLouth entered into a contract with the petitioner by which the petitioner agreed to manufacture and deliver to McLouth, and McLouth agreed to purchase, certain lumber cut in special sizes and shapes, not suitable for petitioner's regular trade. (R. 5–14, 41–46, 48, 50–51.) This contract stated that the lumber was "required to complete four tugs." (R. 5.) The District Court found with respect to the making of this contract (R. 36):

> That at the time plaintiff's contract was entered into with McLouth the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

There is no direct statement or finding that McLouth intended this material for the tugs being constructed for the Fleet Corporation, but that is the necessary inference from the record.

In April, 1919, the Emergency Fleet Corporation directed McLouth to suspend all work on the contracts for the construction of the tugs and to order all work stopped on commitments made by him. (R. 52–54.) This was the method usually employed by the Emergency Fleet Corporation in cancelling such contracts. (R. 53.) McLouth's agent promptly notified the petitioner that the tug contracts had been cancelled and instructed it to stop further shipments. (R. 47–48.) All lumber delivered by petitioner prior to its receipt of this notice had been paid for by McLouth, but in addition to the lumber delivered, petitioner at that time had partially manufactured other lumber for delivery under its contract with McLouth. (R. 47.)

I. C. Wilson, the assistant secretary and sales manager of the petitioner, testified that following receipt by the petitioner from McLouth of notice that the tug contracts had been cancelled and instructions to stop further shipments, an interview between Wilson and McLouth's agent took place, at which interview Wilson proposed that petitioner would accept cancellation of the contract provided it was paid for its losses, including the loss of anticipated profits on that part of the contract which was unperformed; that this offer was not accepted; that

thereafter the Emergency Fleet Corporation requested the petitioner to furnish a statement of its actual expenses incurred under the contract, which the petitioner refused to do, insisting upon its right to anticipated profits; that an effort was made to secure a reinstatement of McLouth's contracts with the Emergency Fleet Corporation, which effort failed; that after receipt of the instructions to stop further shipments no lumber was manufactured for delivery under the contract between the petitioner and McLouth; and that after *final cancellation* of the contract the lumber then on hand and partially manufactured was remanufactured into sizes and dimensions suitable for sale in the petitioner's regular trade and was sold in the ordinary course of its business. (R. 48.)

On September 17, 1919, the Emergency Fleet Corporation wrote McLouth, referring to the contracts with him and their previous suspension and then stating (R. 55):

> It has been decided that no further work will be done on these boats; therefore we are issuing definite cancellation order:
>
> By direction of the board of trustees your contracts 457 and 457 Sup. are hereby cancelled as to hulls Nos. 2415 to 2418 inclusive and hulls Nos. 2716 to 2720 inclusive; and you are hereby directed to notify all subcontractors affected by this cancellation.

This was evidently the "final cancellation" referred to in Mr. Wilson's testimony.

Petitioner brought suit against McLouth in the United States District Court for the Eastern District of Michigan for the alleged breach of its contract with him. (R. 1–14.) After the suit was commenced McLouth died, and the suit was revived against the American Loan & Trust Company, his administrator. (R. 16–22.) Trial by jury was waived and the parties stipulated that the issues of fact might be tried and determined by the court. (R. 23.) The respondent first pleaded the general issue (R. 14–15), but later sought permission to file an amended plea setting forth the contracts between the Fleet Corporation and McLouth, and the facts in connection with the cancellation of these contracts and of the contract between McLouth and the petitioner (R. 28–34). The court permitted the amended plea to be filed over the petitioner's objection. (R. 36.) The court found (R. 36):

> That if plaintiff's lost profits constitute a proper element of damage, that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.
>
> That if plaintiff's lost profits under the contract are not an element of damage, that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract.

The court held that the petitioner's lost profits were not recoverable and rendered judgment for

the petitioner for six hundred and forty-seven dollars and sixty-five cents. (R. 36–39.) The case was taken to the Circuit Court of Appeals by petitioner by writ of error, and the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 73.)

Neither party questions that $647.65 represents the petitioner's actual damage, exclusive of lost profits; the only question in the case is whether the petitioner is entitled to recover an additional amount representing the anticipated profits which it might have made if its contract with McLouth had not been cancelled.

SUMMARY OF ARGUMENT

The Emergency Fleet Corporation had power under the Act of June 15, 1917, and delegation of authority by the President, to cancel the contract between the petitioner and McLouth. The Act is applicable to all contracts, whether private or governmental. *Russell Co.* v. *United States*, 261 U. S. 514.

The Emergency Fleet Corporation exercised this power and cancelled the contract. No particular formality is necessary to effect a cancellation. The Emergency Fleet Corporation intended that the contract should be cancelled and McLouth and the petitioner were notified of this intention. This was sufficient to effect a cancellation.

Upon such cancellation the petitioner was not entitled to recover from McLouth damages for his

failure to complete performance. The contract was at an end, and neither party was entitled to require further performance thereof by the other or to recover damages from the other for failure to perform further.

Such a cancellation amounted to an expropriation of the contract and the petitioner's remedy was against the United States for just compensation, the measure of which is the value of the contract at date of cancellation, which may be affected by the prospect of profit, but which does not include prospective profits.

Other questions argued by the petitioner present no ground for reversal of the judgment below.

ARGUMENT

I

THE EMERGENCY FLEET CORPORATION HAD POWER TO CANCEL THE CONTRACT BETWEEN THE PETITIONER AND M'LOUTH

That the Emergency Fleet Corporation had power under the Act of June 15, 1917, to cancel the contract between the petitioner and McLouth is clear under the decision of this Court in *Russell Co.* v. *United States*, 261 U. S. 514. The contention in that case was that power to cancel contracts under subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, was restricted to private contracts and did not apply to contracts to

which the United States was a party. The Court said (page 519):

> It must be apparent, we think, that the words of the provision, "*any* existing or future contract," read with literal exactness, include all contracts, whether private or governmental. But it is pointed out that the power to "requisition" can not apply to a governmental contract; and this may be conceded, since the Government can not requisition what it already has. Then it is said that inasmuch as the application of the word "requisition" must be confined to private contracts, the other words associated with it must be likewise restricted by virtue of the maxim *Noscitur a sociis*.

On pages 520–521 the Court disposed of this contention as follows:

> But here the meaning of the words considered severally is not in doubt, and the rule is invoked not to remove an obscurity but to import one. There is nothing in the rule or in the statute which requires us to assimilate the words "modify" and "cancel" to the scope of the word "requisition," simply because the latter has a necessarily narrower application. The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu*, giving to each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate "requisition" will

be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

The Court further said, on pages 521–522:

This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The Government was confronted with the vital necessity not only of producing ships and supplies in unprecedented quantities, but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become not only unnecessary but wasteful. Not to provide, therefore, for the cessation of this production when the need for it had passed would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the Nation's power, but that it should come to an end as soon as possible upon the passing of the emergency. In the light of these circumstances it is not unreasonable to regard the statute now under considera-

> tion as intended to accomplish both results, that is: (1) to enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost, and then, (2) upon the passing of the emergency, to enable him to utilize these same powers to stop that production as quickly as possible.

The holding of the Court in the *Russell case*, therefore, is that the President, or his authorized agent, had power under the statute to cancel *any* contract, public or private, (1) during the emergency, to stimulate production to the utmost, and (2) upon the passing of the emergency, to stop that production as quickly as possible.

It follows that when it appeared that the vessels which McLouth had contracted to build for the Emergency Fleet Corporation were no longer required, the Emergency Fleet Corporation had power to cancel not only the contract between it and McLouth but all contracts made by McLouth for materials to be used in the construction of such vessels. The purpose of Congress to permit production to be stopped as quickly as possible upon the passing of the emergency would be to a large extent defeated if the statute should be construed as applicable only to general contracts for finished articles and not to the contracts entered into by the general contractor with subcontractors or materialmen for materials and labor for use in making the finished articles.

The present suit is clearly an attempt to obtain from the United States indirectly an amount which the petitioner could not have obtained directly. This was recognized by the Circuit Court of Appeals when it said, referring to the Act of June 15, 1917, and similar acts (R. 78):

> They were passed to meet the exigencies of war, and because of the impossibility of knowing when the war would end, Congress wisely provided for the cancellation of these contracts to prevent the needless expenditures of public funds, and the waste of material in the construction of ships and tugs no longer needed by the government for war purposes or for any other purpose. Just compensation would necessarily include any damages the principal contractor would be compelled to pay upon any contracts or commitments for material or labor. If sub-contractors are entitled to damages for breach of contract based upon the profits they would earn if these contracts were completed, the benefits of the provision of this Act, in reference to just compensation, would be substantially, if not wholly, lost to the government.

The present case is similar to *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works* (C. C. A., 9th Circuit), 289 Fed. 217; certiorari denied, 263 U. S. 700. In that case it appeared that the Emergency Fleet Corporation had entered into a contract with the Todd Corporation for the

construction of certain vessels, and the Todd Corporation had entered into a contract with the Sumner Iron Works to furnish certain materials for the vessels. The Fleet Corporation cancelled the contract with the Todd Corporation and directed the Todd Corporation to notify all subcontractors affected by the cancellation. Notice of cancellation was duly given by the Todd Corporation to the Sumner Iron Works. The Sumner Iron Works thereafter sued the Todd Corporation to recover damages for the breach of the subcontract. The only question was whether the Sumner Iron Works could recover for anticipated profits, since it had already received more than the amount of all of its other claims. The Court held that there could be no recovery. After referring to the Act of June 15, 1917, it said (pages 219–220):

> The duration of the war and the necessities of the government were both uncertain, and it was the part of prudence on the part of Congress to provide for the cancellation of all contracts imposing future obligations upon the government as soon as public safety and public necessity would permit. The act should receive a liberal construction to that end, and the construction placed upon it by the department charged with its execution is of great weight. The authority to suspend or cancel extended, in our opinion, not only to the principal contract, but to all subcontracts for material and labor, the per-

formance of which would impose further obligations upon the government.

We are not now directly concerned with the claim of the Todd Corporation against the Fleet Corporation or against the United States; but, if the present judgment is permitted to stand, how can the amount of the judgment be excluded from the just compensation to which the Todd Corporation is entitled as against the government? It is said that the Todd Corporation should have provided against such a contingency by contract, and, had it done so, the contract price would have been much higher. But the reservation of rights conferred by law is wholly unnecessary. The contract was canceled, not by the Todd Corporation, but by the authorized representative of the President of the United States, and the Todd Corporation was under no obligation to warn the defendant in error that that authority might be exercised at any time. The principal contract itself contained no such reservation. Doubtless the Fleet Corporation deemed the authority reserved by law ample for its protection. That authority is read into every contract, and is notice to all, and is binding upon all.

The case of *American Chain Co.* v. *Interstate Iron & Steel Co.* (C. C. A., 7th Circuit), 291 Fed. 1006; certiorari denied, 263 U. S. 709, to which the petitioner refers as governing the present case, is not in point. The court held only that no governmental agency "ever requisitioned or modified or

canceiled this contract in suit, or ever directed or required buyer to modify or cancel this contract," and that under such circumstances the buyer was not entitled to escape liability on a contract for material on the ground that some portion thereof might have been for use in the performance of a contract between it and the Emergency Fleet Corporation which had been canceled.

The petitioner's case rests principally on the contention that because petitioner did not know, when he made the contract, that he was furnishing material for Government tugs, his contract is not subject to cancellation under the Act of June 15, 1917. This argument seems to be based on statements made in *Russell Co.* v. *United States*, 261 U. S. 514, 524. In that case, as in this, the canceled contract had been entered into subsequent to the passage of the Act of June 15, 1917, and it was said that the statute should be read into and formed a part of the contract and that cancellation was contemplated when the contract was made. The argument of petitioner is that such a theory may not be applied here, since he made his contract without knowledge that he was furnishing material for performance of a Government contract.

The Act of June 15, 1917, is not limited in its application to contracts entered into after its passage. In respect of contracts made prior to its passage, cancellation is an exercise of the power of

eminent domain, and cancellation of a contract made after the passage of the Act may be rested on an exercise of that power. If the measure of compensation for cancellation fixed by the statute were different from the compensation required by the Constitution to be paid for property taken for public use, some importance would have to be given to whether the cancelled contract was entered into before or after the passage of the Act, and whether the right of cancellation was in effect a stipulation of the contract, entered into in contemplation of cancellation; but the just compensation required by the statute to be paid is the same compensation that is required to be paid under the Constitution. Congress did not intend a different rule of compensation for cancellation, under the power of eminent domain, of contracts entered into prior to the passage of the statute, than for cancellation of contracts entered into after the enactment of the statute in contemplation of the power of cancellation. The result is that it is quite immaterial whether any contractor whose contract was cancelled knew that he was furnishing material to a general contractor for vessels for the United States. It is also immaterial whether he had a subcontract in the sense that his contract specified that the material to be furnished was for use in the performance of a general contract with the United States. If he were in ignorance of this, cancellation of his con-

tract may be attributed to an exercise of the power of eminent domain and need not be considered the exercise of a provision of the contract read into it by implication.

II

THE EMERGENCY FLEET CORPORATION CANCELLED THE CONTRACT BETWEEN THE PETITIONER AND M'LOUTH

If the Emergency Fleet Corporation had power under the Act of June 15, 1917, to cancel the contract between the petitioner and McLouth, there can be little doubt that this power was exercised. The statute prescribes no particular formality which is required in order to effect a cancellation. It is enough if the Emergency Fleet Corporation intended that the contract should be cancelled and if McLouth and the petitioner were notified of this intention. Cf. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619; *College Point Boat Corporation* v. *United States*, 267 U. S. 12.

It appears in the present case that the Emergency Fleet Corporation directed McLouth to suspend all work on his contracts and to order all work stopped on commitments made by him; that pursuant to such directions McLouth's agent ordered the petitioner to stop shipments; that thereafter the petitioner manufactured no further lumber for delivery under the contract; that the Emergency Fleet Corporation requested the petitioner to furnish a statement of its actual expenses incurred

under the contract, which the petitioner refused to do, insisting upon its right to anticipated profits; that an effort was made to secure a reinstatment of McLouth's contracts with the Emergency Fleet Corporation, which effort failed; that the Emergency Fleet Corporation sent McLouth a "definite cancellation order," cancelling his contracts with it and directing him to notify all subcontractors affected by the cancellation; and that thereafter the petitioner remanufactured into sizes and dimensions suitable for sale and sold in the ordinary course of its business the lumber then on hand and partially manufactured for delivery under the contract between McLouth and the petitioner. (R. 47–48, 53–55.)

Under these circumstances it is clear that the Emergency Fleet Corporation intended to cancel the contract between McLouth and the petitioner, and that the petitioner was notified of and fully understood this intention; that while the petitioner insisted that it was entitled to be paid for its loss of anticipated profits it never questioned that the attempted cancellation was the act of the Emergency Fleet Corporation. The testimony of the petitioner's own witness, Mr. Wilson, shows that it was fully informed concerning the situation. It follows that the contract between McLouth and the petitioner must be regarded as cancelled by the Emergency Fleet Corporation under the Act of June 15, 1917.

The result is the same if it be held that the contract between the petitioner and McLouth was not within the effect of the final "definite cancellation order" given by the Emergency Fleet Corporation to McLouth. The Emergency Fleet Corporation had previously directed McLouth to order all work stopped on commitments made by him and McLouth had notified the petitioner to this effect. The Act of June 15, 1917, authorized suspension as well as cancellation of contracts. If the contract between the petitioner and McLouth was never cancelled, it was certainly suspended, and this suspension was never removed. The petitioner's right to recover damages for nonperformance would be no better in the case of a contract thus suspended than in the case of a cancelled contract. Cf. *College Point Boat Corporation* v. *United States*, 267 U. S. 12.

III

THE CANCELLATION BY THE FLEET CORPORATION AMOUNTED TO AN EXPROPRIATION OF THE CONTRACT UNDER THE POWER OF EMINENT DOMAIN, AND THE PETITIONER'S REMEDY WAS AGAINST THE UNITED STATES FOR JUST COMPENSATION, AND NOT AGAINST THE RESPONDENT FOR BREACH OF CONTRACT

Upon cancellation by the Emergency Fleet Corporation of the contract between the petitioner and McLouth, the contract, in so far as it remained executory, was terminated and at an end, and

neither party was entitled to require further performance by the other or to recover damages from the other for failure to perform further. The contract was expropriated by the United States. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 121.

The compensation to be paid was owing from the United States, not from the respondent, and the petitioner was limited to asserting a claim against the United States, in the manner prescribed in the Act of June 15, 1917, for the just compensation therein provided for. It follows that such damage for breach of contract as has been allowed to the petitioner in this case is something it was not entitled to recover against the respondent. But it is immaterial now whether petitioner's remedy for compensation for the value of the contract expropriated was against the respondent or the United States. That compensation is measured by the value of the contract at the time of cancellation. While the prospect of profit may bear on the value of a contract, prospective profits, as such, are not part of the value, and are not part of the just compensation.

Russel Co. v. *United States*, 261 U. S. 514.

Duesenberg Motors Corp. v. *United States*, 260 U. S. 115.

College Point Boat Corporation v. *United States*, 267 U. S. 12.

IV

OTHER QUESTIONS ARGUED BY THE PETITIONER PRESENT NO GROUND FOR REVERSAL OF THE JUDGMENT BELOW

Petitioner says that the contract between it and McLouth was made February 5, 1919, nearly three months after the Armistice, and that for this reason the contract was not subject to cancellation by the Emergency Fleet Corporation. It is, of course, a complete answer to this contention that Congress provided that the authority granted to the President by the Act of June 15, 1917, or by him delegated, should cease six months "after a final treaty of peace is proclaimed between this Government and the German Empire," that such final treaty of peace was not proclaimed until November 14, 1921, and that such authority therefore continued until the Merchant Marine Act, 1920, repealed the provisions of the Act of June 15, 1917, by which it was conferred. The suggestion that authority to cancel a contract was in some way dependent upon whether the contract was made before or after the Armistice is no more than the petitioner's view as to what Congress should have provided, and bears no relation to what Congress actually did provide.

The other points made by petitioner do not need consideration.

The case is so clear on other grounds that it is not necessary to deal with the subject of frustration.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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DECEMBER, 1927.

APPENDIX

The Executive Orders by which the President delegated to the Emergency Fleet Corporation all power and authority vested in him by the Emergency Shipping Fund provisions of the Act of June 15, 1917, and amendments thereto, with reference to construction of vessels, are as follows:

The Executive Order of July 11, 1917

Delegating to the Shipping Board and the Emergency Fleet Corporation the powers granted the President by the emergency shipping legislation

By virtue of authority vested in me in the section entitled "Emergency Shipping Fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether

on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

WOODROW WILSON.

THE WHITE HOUSE,
11 July, 1917

The Executive Order of December 3, 1918

Delegating to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, powers granted to the President by Acts of Congress relative to the emergency shipping fund and approved on or prior to November 4, 1918

Whereas, by Executive Order No. 2664, dated July 11, 1917, I delegated to the United States Shipping Board and to the United States Shipping Board Emergency Fleet Corporation, respectively, certain powers vested in me under the section entitled "Emergency shipping fund" of the urgent deficiency appropriation act approved June 15, 1917; and

Whereas, since the issuance of said Executive Order, the said powers granted in said act have been variously affected or extended by the section entitled "Emergency shipping fund" of the Urgent Deficiency Appropriation Act approved October 6, 1917, by Public Act No. 138, Sixty-fifth Congress approved April 22, 1918, amending said section of said Act of June 15, 1917, and by the sections entitled "Emergency shipping fund" in the Sundry Civil Appropriation Act approved July 1, 1918, and in the First Deficiency Appropriation Act, 1919, approved November 4, 1918, respectively:

Now, therefore, by virtue of the authority vested in me by said laws, supplementing said Order No. 2664, but in no way limiting

or restricting the effect thereof, or of acts heretofore done in pursuance thereof, I do hereby delegate all the power and authority so vested in me, and do direct that—

1. The United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction; and

2. The United States Shipping Board shall have and exercise, subject to its discretion in turn to delegate such exercise as provided in said Executive Order No. 2664, all power and authority now vested in me by said laws with reference to constructed dry docks, marine railways and piers, and to constructed vessels or parts thereof or charters therein; to the operation, management and disposition of such dry docks, marine railways, piers and vessels; and to such other matters as are not herein mentioned.

3. All acts heretofore done by said corporation or by said board, with reference respectively to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes or any of them, be, and they are hereby, ratified and confirmed.

WOODROW WILSON.

THE WHITE HOUSE,
3 December, 1918.

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